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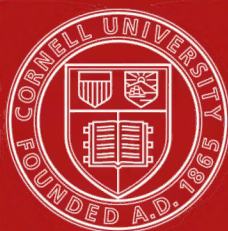
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A treatise on the law of mechanics' lien



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A TREATISE  
ON THE LAW OF  
MECHANICS' LIENS

ON  
REAL AND PERSONAL PROPERTY.

BY  
SAMUEL L. PHILLIPS,  
WASHINGTON CITY, D. C.

*THIRD EDITION.*  
BY FRANK PARSONS.

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## PREFACE TO THE THIRD EDITION.

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ELEVEN hundred and fifty new cases have been added in this edition. The propositions to which they are cited have been incorporated in the text, but can be easily distinguished, for all new cases are bracketed in the notes. Mr. Phillips began the study of the cases for this edition, but delicate health compelled him to yield the labor to other hands. The editor has endeavored to follow the method pursued by the author in former editions. A large number of approval references has been added. Sometimes the case approving the text has been cited to the section as a whole; sometimes to the point in the section specially involved in the said approving decision. The editor personally examined all cases cited by him, and the following list exhibits the volumes studied by him and shows the ground for which he is responsible.

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Vermont . . . . .	54 to 63 inclusive.
Virginia . . . . .	34 to 88 “
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“ “ Mackey . . . . .	1 to 6 “

FRANK PARSONS.

BOSTON, Feb., 1893.





## PREFACE TO SECOND EDITION.

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IN offering a second edition of Phillips on Mechanics' Liens, it is a source of gratification to the publishers to be able to state that the treatise has been of essential benefit to the profession, as is evidenced by the numerous references to its text both by the bench and bar, and more particularly from the fact that, although cited by a large number of courts of last resort in the States as an authority for their decisions, in no one instance has any proposition announced by the author been controverted.

Since the publication of the first edition, the subject of Mechanics' Liens has given rise to a vast amount of litigation, — particularly in those States which have grown most, — and consequently their Reports have many new decisions illustrating this branch of the law. As was stated by the author in the first edition, we predict a still more important position for Mechanics' Liens as the country builds up in towns and cities.

The present edition takes up the subject where the first edition left it, and incorporates the points of every reported case of all the States, down to the moment of publication. Whenever the decision is founded not on the general principles of law, but on the words of a particular statute, these are in addition always given, so as to make the text intelligible and useful. The

profession may therefore feel reasonably assured that the whole law of the subject is presented in this treatise.

This large addition of matter has increased the size of the present volume more than one fifth, and has rendered it impossible to add it in the way of notes. The author has therefore embodied the new matter with the original text, which presents the whole in a more intelligible and convenient form.



## PREFACE TO FIRST EDITION.

---

THE subject of Mechanics' Lien on Real Estate has already become of such importance in the United States that a treatise presenting a complete review of the law must be of great utility to the profession. The increasing growth of the whole country promises a still more important position for this branch of the law.

The compiler of the following treatise has endeavored, in the preparation of its pages, to produce two results; namely, to make it as exhaustive as industry, with access to the Library of Congress, could accomplish, and to give *in extenso* everything of value to be found in the decisions. It will need no explanation to the practitioner to prove that it is desirable to incorporate every reported case. Nothing is more satisfactory than to feel reasonably assured that the subject, as far as decided upon, is presented. It has been the aim of many law writers to give as succinctly as possible the propositions decided by the courts. This plan has not been adopted; it being, in the opinion of the compiler, the least serviceable in a legal treatise designed for use by the bar. The reports are so numerous that but few individuals can possess them with completeness, and it is only in the rare instances of large cities that they can be consulted in public libraries, which the pressure of other professional engagements does not always permit. The

majority of the profession, residing in the smaller cities, towns, and villages, are confined, for the most part, to treatises on special topics and the Reports of their own and neighboring States. To these, a treatise which epitomizes in a line an important decision, establishing the proposition they are seeking, is most unsatisfactory, and gives rise to certain regret that more was not given. To counteract these inconveniences, it is believed that the true system of law writing for practitioners indicates a less extensive scope of subject to be treated, and the incorporation of all that is of value to be found in the Reports applicable thereto. The labors of the bar and bench in cities would be lightened, while the profession located elsewhere would in a great measure have supplied them the resources of large libraries.

In order to render this treatise upon a subject entirely statutory as useful and intelligible as possible, wherever the decision is an interpretation of statutory phraseology, and not of general principles, the words of the law under consideration are quoted.

WASHINGTON CITY, D. C.

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PART I.

MECHANICS' LIEN

ON

REAL PROPERTY.





# MECHANICS' LIENS

ON

## REAL AND PERSONAL PROPERTY.

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### PART I.

#### MECHANICS' LIEN ON REAL PROPERTY.

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#### CHAPTER I.

##### HISTORICAL VIEW OF MECHANICS' LIEN LAWS.

§ 1. **Lien at Common Law.** — The lien of mechanics and material-men on buildings and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the “creation of statute,” and was unknown either at common law or in equity.<sup>1</sup> The idea of lien at common law signified merely the right to hold a thing as collateral security for the payment of debt or performance of duty,<sup>2</sup> and was so inseparably connected with the possession of the subject of the lien, that the right only arose with possession, and terminated with its loss.<sup>3</sup> A mechanic in possession of property he has repaired, has a common-law lien, which is not excluded by the statutory enactments regarding special liens and the proceedings necessary to enforce them.<sup>4</sup> A printer has a lien for work done toward printing a book, not only on paper delivered to him upon which work has been done by him, but upon the whole mass of unused paper, for the general balance

<sup>1</sup> *Davis et al. v. Farr et al.*, 13 Penn. 167; *McNeil v. Borland*, 23 Cal. 144; *Doellner v. Rogers*, 16 Mo. 340; *Ayres v. Revere*, 1 Dutch. (N. J.) 474; *Spencer v. Barnett*, 35 N. Y. 94; *Canal Co. v. Gordon*, 6 Wall. 531; *McCoy v. Quick*, 30 Wis. 521; [*Van Stone v. Stillwell, &c.*, *Manuf. Co.*, 142 U. S. 128, 136.]

<sup>2</sup> *Bean v. Bolton*, 3 Phila. 87.

<sup>3</sup> [See chaps. 46–48.]\*

<sup>4</sup> [*Hurley & Smith v. Epps*, 69 Ga. 611. If a creditor of the owner attaches such property, he must pay the mechanic's charges before he can take the property, or else the officer may be authorized to sell and pay first the mechanic.]

due for his work when the contract is broken in the middle without fault of the printer.<sup>1</sup> In Michigan the law provides in case of a common-law lien that there must be a change of possession so open, visible, and substantial, as to give notice to the public that there has been a change of interest.<sup>2</sup> And this statute merely renders the common-law rule more emphatic, for the common-law lien is always an incident of, and inseparable from, possession. The possession of land was never deemed to be changed by its improvement, but remained in the owner of the freehold; and the mechanic was held to have acquired no right of lien in that over which he had no control. When he placed either his labor or materials upon the land of another, he parted with their ownership, and no right of possession, either to the land or the building, vested in him in return; and any withholding of the premises adversely to the rights of the owner was, in the absence of special agreement, unlawful,<sup>3</sup> and prevented, during its continuance, a recovery of the value of the work performed.<sup>4</sup> His only remedy was to proceed in a personal action against his debtor, and acquire the lien of a judgment creditor.<sup>5</sup> So seldom was a lien created at common law by making improvements on land, that, even as between co-tenants, no lien or right of action existed for reimbursement when made by one tenant on their joint property without special contract;<sup>6</sup> although it was considered a matter of public policy to maintain dwelling-houses and mills, for which a writ of *de reparatione faciendâ* would issue to compel repairs;<sup>7</sup> and it seems that when repairs were made under this writ, if an action would lie at all for contribution, it was only after a request and refusal to join in the reparation.<sup>8</sup> Indeed, the common law was inadequate to administer the system by which mechanics' liens are secured in the United States. There are so many requirements in the matter of remedy, necessary to the protection of the just rights of parties and the public, that courts would have had neither the authority to establish nor the power to enforce them without the aid of legislative enactments. None were ever adopted, and none to this day are to be found on the statute-books of Great Britain, securing in any manner to the mechanic or material-man

<sup>1</sup> [Conrow v. Little, 115 N. Y. 387, 392.]

<sup>2</sup> [Smith v. Greenop, 60 Mich. 61. See § 479 et seq.]

<sup>3</sup> Pratt v. Tudor, 14 Tex. 37.

<sup>4</sup> Johnson v. Crew, 5 Upper Canada Jurist, O. S. 200; Meyer v. Seebald, 11 Abb. Pr. (N. Y.) N. S. 326.

<sup>5</sup> Meyer v. Seebald, id. 326.

<sup>6</sup> Story Eq. Jur. § 1235.

<sup>7</sup> Co. Litt. 200 b; Loring v. Bacon, 4 Mass. 574.

<sup>8</sup> Converse v. Ferre, 11 Mass. 325; Doane v. Badger, 12 Mass. 65.

a lien on the buildings their industry or capital has contributed to erect.

§ 2. In Equity.—Although in equity the possession of land is not essential to a lien, and the term is used to denote a charge or encumbrance merely, with no right to the thing itself,<sup>1</sup> yet courts of equity have so closely followed the general doctrine of the common law as to hold that land belonging to and being in the possession of the proprietor, and not the builder, the materials, as far as incorporated in the structure, become annexed to and form part of the real estate, and vest accordingly as to title and possession. Without special agreement, therefore, no equity arises for a lien upon a mere building contract;<sup>2</sup> particularly in the absence of such special circumstances as the marshalling of assets of an insolvent owner in favor of the mechanic, or of fraud, or other distinct ground of equitable interposition.<sup>3</sup> But courts of equity will, between parties and those having notice, enforce specifically agreements stipulating for equitable liens in consideration of improvement of land. Thus, wherever a contract provides either for the possession of premises<sup>4</sup> or for an interest therein until payment of the price of the buildings, or more distinctly for a lien, the rights of the mechanic will be protected and the lien enforced.<sup>5</sup> They have also extended the doctrine of contribution farther than at common law, by allowing co-tenants and in some cases parties in possession of real estate, who have *bonâ fide* made repairs and improvements which have been of substantial benefit to the estate, to have not merely a personal charge against the delinquent tenant, but an equitable lien upon the estate itself.<sup>6</sup> This lien, however, is entirely distinct in character from the statutory lien secured to mechanics. It derives its existence from the general equitable jurisdiction of the courts, which, on the other hand, have no power to enforce this statutory lien unless expressly conferred by law, or unless, perhaps, there exists some impediment or difficulty which would render the remedy given by the statute unavailable.<sup>7</sup> When by a statute a new right is given, and a specific remedy provided,

<sup>1</sup> Willard Eq. Jur. 123.

<sup>2</sup> Ellison v. Jackson Water Co., 12 Cal. 542.

<sup>3</sup> Quimby v. Sloan, 2 E. D. Smith (N. Y.), 614; Taylor v. Baldwin, 10 Barb. (N. Y.) 626.

<sup>4</sup> Pratt v. Tudor, 14 Tex. 37; Johnson v. Crew, 5 Upper Canada Jurist, o. s. 200.

<sup>5</sup> Rogers v. The Dock Co. at Kingston, 5 New Reports (1864), 26.

<sup>6</sup> Story Eq. Jur. § 1236. The instances in which this equitable lien was recognized have been where the delinquent co-tenant has himself come into equity, seeking relief. Taylor v. Baldwin, 10 Barb. (N. Y.) 582; s. c. 10 id. 626; Green v. Putnam, 1 Barb. (N. Y.) 500.

<sup>7</sup> Coleman v. Freeman, 3 Ga. 137; Quimby v. Sloan, 2 E. D. Smith (N. Y.), 615; Otley v. Haviland, 36 Miss. 19.

or a new power and also the means of executing it are provided by statute, the power can be executed and the right vindicated in no other way than that prescribed by the statute. The jurisdiction and the remedy, being bounded by the statute, can be pursued and exercised only before the tribunals, and in the mode prescribed. Other tribunals cannot exercise the jurisdiction without enlarging the operation of the statute. Thus where authority was conferred on a probate court to adjudge cases of mechanics' liens, no jurisdiction exists in a court of equity to enforce such liens. It might be, however, if fraud should intervene, obstructing the enforcement of the lien by the statutory remedy, or some other impediment or difficulty is interposed, rendering the statutory remedy inadequate, a court of equity could take jurisdiction to enforce it, as it takes jurisdiction upon its own principles to relieve against fraud or accident, when legal remedies are not complete or appropriate; otherwise, such court has no jurisdiction. A single averment "that the statements of the accounts against said defendants are difficult, and cannot well be shown in a court of law," is not an averment of facts showing a complication of accounts, rendering necessary the intervention of a court of equity.<sup>1</sup> In cases where this special jurisdiction has been imposed on these courts, they have no authority to extend the lien to cases not provided for by statute.<sup>2</sup>

§ 2 *a*. In Equity — continued. — The present state of the law as to the power of courts of equity to enforce this lien, as courts of chancery, exclusive of any statutory jurisdiction conferred on them, may be stated to be, that where the remedy of the mechanic is plain, adequate, and complete at law, equity will not interfere.<sup>3</sup> For, as it is said, proceedings to impose and enforce mechanics' liens have no foundation at common law or in equity, but rest entirely upon the statutes authorizing them, and courts cannot supply supposed defects.<sup>4</sup> Accordingly, where a statute gives a new right and provides a specific remedy, such right can be vindicated only in the way thus prescribed. And except under special circumstances disclosing particular grounds for its interference, equity has no jurisdiction to enforce the lien thus created; nor can it enjoin the prosecution of an action at law to enforce one such lien, upon the application of a creditor having another lien of the same kind, on the ground that the latter is

<sup>1</sup> [Chandler v. Hanna, 73 Ala. 390; Phillips § 2, cited with approval.]

<sup>2</sup> Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165.

<sup>3</sup> Cole v. Colby, 57 N. H. 100; [Walker v. Daimwood, &c., 80 Ala. 245, 246; Chandler v. Hanna, 73 Ala. 390.]

<sup>4</sup> Benton v. Wickwire, 54 N. Y. 226.

not made a party to such legal action. But it seems that a subsequent mechanic lien holder, if he can aver illegality in the claims alleged in a petition prior to his own, impeach their amount, charge fraud or collusion therein, or set up a higher equity in his own favor, may file his bill in equity to have such claims set aside or postponed in his favor.<sup>1</sup> So where, as between rival claimants of lien against a building erected by a lessee, as to which a lien was given by statute, the brick improvement of the house alone cannot be separated from the work of the carpenter thereon, and separately sold, without serious injury of the property, yet on a bill in equity filed by the mechanic against the true owners and lessees, alleging the insolvency of all the defendants, and the regularity of the proceedings to enforce the lien, and the impossibility of subjecting and selling the improvement by itself at law, and the inadequacy of any remedy at common law, equity will intervene, and either order the sale of the entire property and pay the mechanic the value of his improvement in proportion to the value of the whole premises, or secure an adequate share of the rental thereof for his payment.<sup>2</sup> In another case, where there was a claim for non-performance of contract, and the owner finished the houses himself, and had made numerous payments to both the contractor and sub-contractors, and the contractor and sub-contractors commenced actions to enforce their liens, it was held that under these circumstances the owner might maintain a bill in equity, bringing all the parties into one suit, to enjoin the proceedings at law, and have all the claims settled in chancery, which, if conducted in separate actions, would prove a very complicated and expensive proceeding.<sup>3</sup> On the other hand it has been decided by another court that the proceedings are strictly statutory, and without the aid of statute cannot be maintained, and where they provide for simply the adjudication of the lien and its amount, an owner of property cannot file a cross-bill against the petitioner for the purpose of procuring a personal decree against him for damages for delay in the work, and to have certain suits at law growing out of the building contract enjoined. If the lien is defeated, which can be done by answer, the petition must be dismissed, and the party remitted to his action at law.<sup>4</sup>

§ 3. **Civil Law.**—Under the civil law, which allows a lien, as an hypothecation, to exist without possession of the thing

<sup>1</sup> Hall v. Hinckley, 32 Wis. 362.

<sup>2</sup> Gaskill v. Davis, 53 Ga. 645.

<sup>3</sup> Painter v. Drane, 2 MacArthur, (D. C.) 163.

<sup>4</sup> McCarthy v. New, 93 Ill. 455.

hypothecated, architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have a privilege for their salaries, and for what they furnish.<sup>1</sup> The privilege here referred to is a right of priority over other creditors who may be prior in point of time, or even who may have mortgages.<sup>2</sup> In respect of improvement of estates, it is limited to what remains of them in being, and does not affect the whole body of the estate as the above-mentioned privilege on account of repairs, which is deemed to have preserved the whole estate in being. For if there remain nothing of the improvements, the estate not being anything the better for them, and no one profiting by them, there remains no longer any cause for preference. And when the improvements do subsist, the privilege of him who has been at the charge of them takes place only on the value of what remains of them. This preference extends to the creditor whose money is laid out in preserving or repairing the thing, as, for example, to secure a piece of ground against the current of a river, to prevent the fall of a house, or to rebuild it after its fall; for he has preserved the thing in being for the common interest, both of the proprietor and creditors, and it is, as it were, his own, to the value of what he has laid out upon it.<sup>3</sup> Following the same equitable principle, those whose money has been laid out on the improvement of an estate, such as to make a plantation, or to build upon it, or to augment the apartments of a house, or for other the like causes, have a privilege upon the improvements made.<sup>4</sup> This right is not confined to the immediate parties, but extends to those who advance money for the improvement. If a third person lend to an architect or other undertaker money which is laid out on a house or any other work, and the money has been advanced by order of the master for whom the work is to be done, this third person has the same privilege as if he had lent the money to the master himself for that use. But if the money were lent without the master's knowledge or without his order, and if the master has paid the undertaker, he who has lent the money has his action only against the person to whom he lent it. But if the master has not paid the undertaker, this third person may use the privi-

<sup>1</sup> 1 Domat's Civil Law, by Strahan, § 1744.

<sup>2</sup> Id. § 1736.

<sup>3</sup> 1 Domat's Civil Law, by Strahan, § 1741.

<sup>4</sup> Id. § 1742.

lege, whether he has lent the money by the master's order or without it,<sup>1</sup> provided he obtain an order from a judge attaching the credits of his debtor in the hands of the master.<sup>2</sup>

§ 4. **Modern Nations.**—Continental countries, which adopted the civil law as the basis of their jurisprudence, have, with few exceptions, secured to workmen and material-men privileges analogous to those given by the civil law. In France, by the Code Napoléon, architects, contractors, masons, and others employed in building, rebuilding, or repairing houses, canals, or any other works whatsoever, have a privilege on the same for their reimbursement, provided that an estimate has been previously drawn up by a competent person, officially nominated by the court of first instance within whose jurisdiction such buildings are situated, for the purpose of inspecting the state of the property, in relation to the improvements which the proprietor shall declare he has an intention to make, and provided, further, that such improvements have been, within six months from their completion, inspected and admitted by a competent person, likewise officially nominated; but the amount of the privilege cannot exceed the value set forth by the second statement, and is reduced to the surplus value existing at the period of any alienation of the property, resulting from the labor and materials expended thereon. Those who have loaned money to pay or reimburse workmen enjoy the same privilege, provided such employment be authentically verified by the act of loan, and by the acquittance of the workmen that such payment was made with money loaned for that purpose.<sup>3</sup> This privilege, in the event of either a judicial or voluntary sale of the property, only extends as against the unpaid vendor to the increased value the improvements give to the property at the time of the sale. It was to ascertain the original value of the property before it was obliterated by the repairs or additions, and thus protect the original vendor, that it was made necessary to have the premises inspected by a competent person nominated by the court.<sup>4</sup> When these formalities were complied with, the privilege took effect from the date of the enrolment of the first statement made by the officer named.<sup>5</sup> Almost identical provisions are adopted in Belgium by its revised code.<sup>6</sup> The laws of Spain and Mexico

<sup>1</sup> 1 Domat's Civil Law, by Strahan, § 1745.

<sup>2</sup> Id. § 1786.

<sup>3</sup> Code Napoléon, Privileges and Mortgages, sec. 2, art. 2103.

<sup>4</sup> Merlin Répertoire, Privilège de Creance, sec. ii. § 2.

<sup>5</sup> Code Napoléon, art. 2110.

<sup>6</sup> Law of Dec. 16, 1851. See also Allgemeines Landrecht für die Preussischen Staaten, vol. i. tit. 11, §§ 971, 972.

also secure, in the nature of a privilege, sums due for money lent or materials furnished to rebuild a house or other edifice, if the money or materials were actually employed for such purpose;<sup>1</sup> but these are subordinated, in case the property of a debtor is insufficient to pay all his creditors, to funeral expenses, debts due the public treasury, rent, and in some cases, dower.<sup>2</sup> The civil codes of the kingdom of Sardinia,<sup>3</sup> and Lower Canada,<sup>4</sup> are almost identical with the Code Napoléon. The civil code of the Argentine Republic gives workmen, and material-men whose materials have been used in the building, and persons who have loaned money to contractors to complete the work, a lien for the amounts due them; but this privilege does not extend to sub-contractors and under-workmen.<sup>5</sup>

§ 5. **Civil Law of Louisiana.**—The civil code of Louisiana follows substantially the provisions of the civil law in regard to mechanics and laborers. By it the undertaker has a privilege, for the payment of his labor, on the building or other work which he may have constructed. Workmen employed immediately by the owner in the construction or repair of any building have the same privilege.<sup>6</sup> Sub-contractors and all workmen, or other persons furnishing materials, are now secured by serving an attested account of their demands on the owner, who is thereupon required to retain the amount out of his subsequent payments to the contractor.<sup>7</sup> If the payments have been previously made to the contractor, the right is gone; but payments in anticipation are considered, with regard to workmen and those who furnish materials, as not having been made, and do not prevent them from availing themselves of this right.<sup>8</sup>

§ 6. **Origin in United States.**—There is no direct evidence as to what cause in particular gave rise to the system of mechanics' liens adopted in the United States. It has been supposed by some, that in Pennsylvania, which was among the first States to establish the principle, it owed its existence to the analogous provisions contained in the act of that Commonwealth of 1784, relating to persons employed in building and repairing vessels.<sup>9</sup>

<sup>1</sup> Partidas, 1. 28, t. 13, p. 5; Civil Law of Spain and Mexico, by G. Schmidt, 301; *Macondray v. Simmons*, 1 Cal. 393.

<sup>2</sup> Civil Law of Spain and Mexico, by Schmidt, art. 1418.

<sup>3</sup> Code Civil du Royaume de Sardaigne, par Foucher, vol. ix. part 2, art. 2158.

<sup>4</sup> Civil Code of Lower Canada, art. 2013.

<sup>5</sup> Código Civil de la Republica Argentin-

ina, lib. iv. sec. 2, tit. 1, cap. 4, arts. 57-59.

<sup>6</sup> Civil Code of La., art. 2743.

<sup>7</sup> Act approved March 14, 1855.

<sup>8</sup> Civil Code of La., arts. 2744, 2745.

<sup>9</sup> Explanatory Remarks of the Commissioners to revise Civil Code of Penn.; Sergeant's Mechanics' Lien Law of Penn. 1.



Others seem inclined to trace its origin exclusively to the necessity in a young and growing country of fostering mechanical and industrial pursuits, and the manifest equity of dedicating primarily buildings and the land upon which they are erected to the payment of the labor and materials incorporated, and which have given to them an increased value.<sup>1</sup> To the legislators of the early part of the present century there was no scarcity of precedent to justify the enactment of statutes to protect a large and meritorious portion of the community, which was for the most part poorly able to sustain the losses incident to business, and peculiarly liable to the frauds of the dishonest.<sup>2</sup> It was but a short step, in a country not hampered by any remnant of a feudal system, the policy of which was slow in subjecting lands to the payment of debts, even after judgment, to extend the familiar and well-understood doctrine of lien of the artificer on a chattel to a mechanic on a building. They were each equally meritorious. Nor is it to be supposed that the lawyers who framed these acts were ignorant of the eminently just provisions of the civil law, which, as we have seen, secured not only the builder and workman, but even persons who furnished funds for improvement of real estate, when they were expended upon it. These precedents, and the expediency of encouraging the building of towns and cities,<sup>3</sup> together with the natural justice in the statutes,<sup>4</sup> and the power in a republican government of the class itself the law was designed to protect, early in the history of this country gave birth to this system, which in the completeness of the lien secured, the remedy, the protection of the rights of all parties, and its limited and harmonious restrictions upon alienation of real property, far surpasses the provisions of the civil law, and of those countries which have founded their jurisprudence on its principles.

§ 7. **Past and Present State of the Law.** — The first attempt to create a mechanics' lien arose from a desire to establish and improve as speedily as possible the city of Washington, as the permanent seat of government of the United States. At a meeting, Sept. 8, 1791, of the commissioners appointed for this purpose, at which both Thomas Jefferson and James Madison were present, a memorial was adopted,<sup>5</sup> urging the General

<sup>1</sup> *Esterley's Appeal*, 54 Penn. 192; *Merchants' Ins. Co. v. Mazange*, 22 Ala. n. s. 180.

<sup>2</sup> *Bolton v. Johns*, 5 Barr (Penn.), 150; *Buck v. Brian*, 2 How. (Miss.), 874; *Buchanan v. Smith*, 43 Miss. 90; *Montandon v. Deas*, 14 Ala. n. s. 33.

<sup>3</sup> *Presbyterian Church v. Stettler*, 26 Penn. 246.

<sup>4</sup> *Collins v. The Central Bank*, 1 Ga. 458; *Taggart v. Buckmore*, 42 Me. 77; *Perkins v. Pike*, id. 141.

<sup>5</sup> *Proceedings of Commissioners from 1791 to 1795*, p. 28, deposited in Capitol

Assembly of Maryland to pass an act securing to master-builders a lien on the houses erected and land occupied, which was during the same year followed by the passage of a law as requested.<sup>1</sup> The next statute on the subject was passed by the legislature of Pennsylvania in the year 1803.<sup>2</sup> These statutes, while they contained the germ of all subsequent legislation on the subject, are imperfect and meagre in comparison with the state of the law at the present time. The whole subject has been one of gradual growth,<sup>3</sup> extending from imperfect and limited enactments, embarrassed by adverse decisions, to be the settled policy of all the States, and of unquestioned importance.<sup>4</sup> The experiment was at first confined to towns and cities, but has by degrees, as its necessity and justice became apparent, extended itself in a majority of the States to the agricultural districts. The lien was designed in its inception, for the most part, to secure only the principal contractor, until the frauds perpetrated upon subcontractors and workmen gave rise to amendments for their proper protection.<sup>5</sup> It attached in some of the States only when the party making the contract was the owner of the legal title in fee-simple. It is now generally provided, that, however small may be the interest of the contracting party, the lien fastens itself to that extent, and whether the title be legal or equitable. Formerly it applied by some statutes only to cases of original construction. It is now almost universally applicable to repairs. It was confined in some localities to the building of dwelling-houses. At present, where the pursuits or industries of the particular section of the country render it of sufficient importance, it attaches to bridges, canals, flumes, machinery, fixtures, etc. Distinctions were sometimes made between labor performed and materials furnished. They are now universally deemed equally meritorious. And where statutes failed by express terms to subject the land to the lien, as well as the building, the courts have by judicial interpretation remedied the defect. In the matter of remedy there have been no less valuable improvements. In some instances there were, when the lien once attached, no provisions requiring the mechanic to per-

at Washington. "Your memorialists conceive it would encourage master-builders to contract for the erecting and furnishing houses for certain prices agreed on, if a lien was created by law for their just claim on the house erected, and the lot of ground on which it stood."

<sup>1</sup> Act of Gen. Ass. of Md., c. 45, passed Dec. 19, 1791.

<sup>2</sup> Laws of Penn., Act of 1st April, 1803.

<sup>3</sup> Collins v. Mott, 45 Mo. 100; White v. Miller, 18 Penn. 52.

<sup>4</sup> Putnam v. Ross, 46 Mo. 337; Davis v. Farr, 13 Penn. 170.

<sup>5</sup> Bolton v. Johns, 5 Penn. 150.

fect it, thus operating to the great detriment of the owner, and prevention of alienation. Occasionally, no time was limited to give notice of the intention to claim the lien, or, if limited, was too long, thereby suffering owners to settle with contractors, and the public to believe the property was no longer subject to debts for its erection. Frequently great wrong was perpetrated by the owner, after the building was commenced, secretly encumbering it by mortgage or judgment before he made default with his workmen, who had therefore filed no notice of lien. This has been remedied either by making the lien date from the commencement of the building, or by confining all encumbrances, prior to the notice of lien, to the value of the land at the date of the commencement of the building, and giving the mechanic a priority upon the structure alone, and the increased value which his labor has added to the premises, somewhat in analogy to the civil law. These and many other changes to be mentioned in the following pages will suffice to show the stages through which the law has passed. Its complete history is not to be found in the enactments of any one State. As each has legislated upon the subject, it has been guided by the experience of others; extending its provisions when necessary, and in some instances repealing privileges found to operate injuriously to the public, and which were passed through probably an over-anxious zeal to protect the laboring classes, until a system has grown up, at once just and rational, securing the public from all danger of secret liens, and labor and capital their lawful rights. It is not to be assumed, however, that the statutes of any one State have presented all these defects, or have attained such a perfectness as to render future legislation unnecessary. In some the law is still inadequate to the full protection of the rights of the workingman; while in others the privileges secured mechanics operate with hardship upon owners, and reflectively to their own detriment. The true system is to be found in that which gives an undue advantage to none, while recognizing the just rights of all.

§ 8. **Similarity of Statutes.** — While each State has its own mechanics' lien law, which is rarely identical in every particular with that of another, yet all of them, having the same object in view, are in their main provisions so nearly alike, and in some instances mere re-enactments of each other, that the judicial interpretations of any particular statute may be used to advantage, either as a direct authority or as illustrating principles arising under similar laws. It makes, therefore, a compilation

of decisions of practically not much less value than if but one statute prevailed. Indeed, the want of such a treatise will be apparent in the following chapters, where it will many times appear that courts, interpreting identical phraseology, have construed it in different manners. No treatise has heretofore appeared in which the various decisions relating to the mode of procedure have been attempted to be collected. Each court has been compelled to rely upon the facilities or industry of counsel in the particular case to furnish precedents. A compilation which endeavors to present every adjudication may be the means of not only producing a greater similarity of decision and of legislative enactment, but a more perfect system that will operate for the general good of the whole.

## CHAPTER II.

## NATURE OF THE LIEN.

§ 9. **Characteristics.** — The lien of the mechanic, here treated of, is a remedy in the nature of a charge on land, given by statute to the persons named therein, to secure a priority or preference of payment for the performance of labor or supply of materials to buildings or other improvements to be enforced against the particular property in which they have become incorporated, in the manner and under the limitations therein expressly provided.<sup>1</sup> It is exclusively the creature of statute,<sup>2</sup> deriving its existence only from positive enactment. There can be no lien independent of statute.<sup>3</sup> It does not arise out of,<sup>4</sup> nor is it of the essence of, the contract for labor,<sup>5</sup> nor dependent on the motives which suggest its being enforced.<sup>6</sup> "This lien may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected. It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material-man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute."<sup>7</sup> It is a mere incidental accompaniment as a means of enforcing payment, — a remedy given by law, which secures the preference provided for,<sup>8</sup> but which does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with

<sup>1</sup> *Brown v. Story*, 4 Met. (Ky.) 316; *Barrows v. Baughman*, 9 Mich. 213.

<sup>2</sup> *Grant v. Vandercook*, 8 Abb. Pr. n. s. (N. Y.) 455; *Chambersburgh Man. Co. v. Hazelett*, 3 Brewst. (Penn.) 98; [*Van Stone v. Stillwell & Co. Manfg. Co.*, 142 U. S. 128, 136.]

<sup>3</sup> *Childs v. Anderson*, 128 Mass. 108; *Dinkins v. Bowers*, 49 Miss. 219.

<sup>4</sup> *Sodini v. Winter*, 32 Md. 130.

<sup>5</sup> *Frost v. Hsley*, 54 Me. 345; *Tilford v. Wallace*, 3 Watts (Penn.), 141; *Peck v. Hensley*, 21 Ind. 344; *Montandon v. Deas*, 14 Ala. n. s. 33.

<sup>6</sup> *Gordon v. Torrey*, 2 McCarter's Ch. (N. J.) 112.

<sup>7</sup> *Van Stone v. Stillwell, & Co. Man. Co.*, 142 U. S. 128, 136.]

<sup>8</sup> *Bailey v. Mason*, 4 Minn. 546.

all its essential requirements.<sup>1</sup> It is not a judgment,<sup>2</sup> and does not give the mechanic a right to his debt, which arises out of the performance of contract, and exists without the aid of statute.<sup>3</sup> A debt may survive when the lien is gone, and an estoppel to prevent the denial of the debt will not keep the lien alive.<sup>4</sup> It is a cumulative remedy which may be concurrently pursued in connection with the ordinary actions for the collection of debts.<sup>5</sup> It does not confer an independent right,<sup>6</sup> or create an estate in the property itself,<sup>7</sup> or give any interest which would support an action of ejectment.<sup>8</sup> It has, however, been held to confer an insurable interest.<sup>9</sup> In another case it was said that a party having a mechanics' lien on buildings by him erected on land then covered by mortgage has an insurable interest, limited only by their value and the amount of his claim. His discontinuance of his suit to enforce the lien after their destruction is not matter of defence to his action on the policy.<sup>10</sup> The holder of a mechanic's lien on buildings that are burned while insured for and in the name of their owner, does not hold the insurance fund by right of subrogation.<sup>11</sup> This is no doubt in accord with the mass of authority, but I believe it to be bad reason. The owner's insurance should be substituted in the place of the property, and those who have claims on the property should have claims on this fund in the owner's hands in the same order of priority on the principle of 26 N. Y. 253 and 21 Pa. 513. The absolute ownership of land and powers incident to property are not in the slightest degree suspended by the lien; nor are prior encumbrances interfered with.<sup>12</sup> It does not give any right of possession to the property, as against the owner;<sup>13</sup> nor a right to have a receiver of rents and profits appointed pending the suit.<sup>14</sup> The owner's free enjoyment of the property will be interfered with only when his use of it tends to its injury to such an extent as to impair its value as a security.<sup>15</sup> A mechanic's lien is not property, or a right in or to property; it is neither a *jus in re* nor a *jus ad rem*. It is simply a right to charge the property it

<sup>1</sup> Greene v. Ely, 2 Greene (Iowa), 508; Williams v. Tearney, 8 S. & R. (Penn.) 58; Ellison v. Jackson Water Co., 12 Cal. 542; Spencer v. Barnett, 35 N. Y. 96; Quimby v. Sloan, 2 Abb. Pr. (N. Y.) 100; Noll v. Swineford, 6 Penn. 187; Atchison, T. & Santa Fé R. v. Cuthbert, 14 Kan. 212.

<sup>2</sup> Hersey v. Shenk, 58 Penn. 388.

<sup>3</sup> Hall v. Bunte, 20 Ind. 304.

<sup>4</sup> Hunter v. Lawning, 76 Penn. 25.

<sup>5</sup> Ehlers v. Elder, 51 Miss. 495.

<sup>6</sup> Hall v. Bunte, 20 Ind. 304.

<sup>7</sup> Mason v. Jones, 2 Barb. (N. Y.) 229.

<sup>8</sup> Carson's Lessee v. Boudinot, 2 Wash. C. C. 33.

<sup>9</sup> Franklin Fire Ins. Co. v. Coates, 14 Md. 285.

<sup>10</sup> Insurance Co. v. Stinson, 103 U. S. 25.

<sup>11</sup> [Rackley v. Scott, 61 N. H. 140.]

<sup>12</sup> Mason v. Jones, 2 Barb. (N. Y.) 229.

<sup>13</sup> Pratt v. Tudor, 14 Tex. 37; Conrad v. Atl. Ins. Co., 1 Pet. 386.

<sup>14</sup> Meyer v. Seebald, 11 Abb. Pr. (N. Y.) 326.

<sup>15</sup> P. & G. & A. & G. R. R. v. Spratt, 12 Fla. 26.

affects, with the payment of a particular debt, in preference and priority to other debts, so far as the statute confers such preference, if all the requisitions of the statute are observed. Of itself, when the statutory requisitions to its creation are observed, it has not the force and effect of a judgment, and is not self-enforcing, or self-executing. Until a judgment is obtained, in the mode pointed out in the statute, it is inchoate; and it is as dependent, for operation and effect, upon the rendition of a judgment, as the statute directs, as is the lien created by the levy of an attachment upon the rendition of judgment in the attachment suit.<sup>1</sup> It does not create even after being judicially established by judgment or decree, any privity of estate,<sup>2</sup> or right of entry thereunder, but is in the nature of a legal charge,<sup>3</sup> running with the land, encumbering it in every change of ownership, and preventing subsequent alienations or encumbrances only by making them subordinate to the rights of the lien-holder.<sup>4</sup>

§ 10. **Relation to Other Liens.**<sup>5</sup>—It bears no analogy to the particular lien of the artisan for labor and skill expended in the construction or reparation of a chattel, which is a bare right to hold the thing till payment; nor to the general lien known to the common law, that secured a general balance of accounts.<sup>6</sup> It is not a general, but a particular lien.<sup>7</sup> A mechanics' lien and the lien of a judgment are not identical with each other; the former affecting only the property on which the work is done, the latter all the debtor's real estate.<sup>8</sup> They are so far different that it was held, although there may be a general act limiting judgments to five years, yet, if there be not some expression to show that a mechanics' lien is subject to the same limitation, it will not be affected by the act, but be of indefinite duration.<sup>9</sup> It is *sui generis*, essentially different from most other liens known to the law.<sup>10</sup> Its existence is not to be presumed. It requires express words not only to create it, but, when created, to limit its otherwise indefinite duration, and again, if limited in its period of existence, equally express words to continue it beyond that period.<sup>11</sup> It is only a limited privilege, arising in

<sup>1</sup> [Porter v. Miles, 67 Ala. R. 130, citing Phillips Mechanics' Lien, § 9, with approval.]

<sup>2</sup> Merchants' Ins. Co. v. Mazange, 22 Ala. N. S. 168.

<sup>3</sup> Brown v. Story, 4 Met. (Ky.) 316.

<sup>4</sup> Brackney v. Turrentine, 14 Ark. 416; 12 Wheat. 179. Section 9 is cited with approbation in Scudder v. Harden, 31 N. J. (Eq.) 503.

<sup>5</sup> This section is cited with approbation in Waldroff v. Scott, 46 Tex. 1.

<sup>6</sup> Taggard v. Buckmore, 42 Me. 77.

<sup>7</sup> Mochon v. Sullivan, 1 Montana, 472.

<sup>8</sup> Freeman v. Cram, 3 Comst. (N. Y.) 305.

<sup>9</sup> Knorr v. Elliott, 5 S. & R. 49.

<sup>10</sup> Luter v. Cobb, 1 Coldw. (Tenn.) 525.

<sup>11</sup> Isaac v. Swift, 10 Cal. 71; Knorr v. Elliott, 5 S. & R. 49.

positive enactment, which confers no right of sale without the process prescribed by law;<sup>1</sup> and any essential departure from its directions will be fatal to those who attempt to enforce it.<sup>2</sup> In this strict adherence to the requirements of the law, there is deemed to be no inequity, as the party claims to fasten an unusual right upon the land of another, with priority over other creditors.<sup>3</sup>

§ 11. **Similarity to Lien of Mortgage.** — The nature and extent of the security effected by the lien depends on the particular statute creating it. Ordinarily, it is equal to that of a judgment or mortgage,<sup>4</sup> and, when declared so by statute, is to be governed in its assignment and enforcement by the rules applicable to them. As where a statute requires that "every conveyance whereby real estate is aliened, mortgaged, assigned, charged, or affected must be in writing," a mechanics' lien, being declared to be "in the nature of a mortgage," is a charge on the land, and can only be assigned in writing.<sup>5</sup> So where a lien law provided that the mechanic "shall have a lien in the nature of a mortgage," unless there is something in the statute which confines the remedy to a court of law, the lien may be enforced in a court of chancery.<sup>6</sup> It may by law so far resemble a mortgage, that it will not affect the rights of a married woman, unless she co-operates, as in case of a mortgage, with her husband to bind her estate.<sup>7</sup> Though, as we have seen, the lien is regarded in the light of a remedy, yet for some purposes courts have held it to be a real or proprietary interest, in the nature of a mortgage, which may in its ultimate operation divest the title of the owner.<sup>8</sup> Indeed, generally, a statutory lien is as binding as a mortgage, and will not, as long as there has been a compliance with the law, be divested by subsequent liens.<sup>9</sup> In some cases it has been considered as equivalent to a mortgage to secure the purchase-money of land; as where a railroad company had a depot constructed, and then claimed it to be exempt from the operation of the mechanics' lien for its erection, on grounds of public policy. This was denied, and the equity of the mechanic affirmed to be similar to that of a vendor.<sup>10</sup> This principle, however, does not extend so far as to make the purchase of materials to be used in the erection or reparation of a house on land

<sup>1</sup> *Coit v. Waples*, 1 Minn. 134.

<sup>2</sup> *Greene v. Ely*, 2 *Greene* (Iowa), 508, [approved in 87 Ala. 465, citing *Phillips*.]

<sup>3</sup> *Noll v. Swineford*, 6 Penn. 187; *Quimby v. Sloan*, 2 Abb. Pr. 93.

<sup>4</sup> The case of *John Thompson*, 2 *Browne* (Penn.), 297; *Goodman v. White*, 26 Conn. 317.

<sup>5</sup> *Ritter v. Stevenson*, 7 Cal. 388.

<sup>6</sup> *Montandon v. Deas*, 14 Ala. N. S. 33.

<sup>7</sup> *Fitch v. Baker*, 23 Conn. 563.

<sup>8</sup> *Donahy v. Clapp*, 12 Cush. (Mass.) 440.

<sup>9</sup> *Rogers v. Dickey*, 6 Ill. 636.

<sup>10</sup> *Hill v. La Crosse & Mil. R. R. Co.*, 11 Wis. 214.



claimed and occupied as a homestead, equivalent to a claim of a vendor for his unpaid purchase-money, which is protected by homestead acts;<sup>1</sup> nor can claimants who have failed to take the proper steps to enforce their liens, and thus lost them, be considered in the similar character of unpaid vendors.<sup>2</sup> In another case, a policy of insurance provided that the company should not be liable "if, without written consent hereon, the property shall hereafter become encumbered in any way." Subsequently to the issuing of the policy, a mechanics' lien was filed against the property, but no proceedings were ever taken to enforce the same. It was not shown that plaintiff had knowledge of the filing of the lien until after the destruction of the property by fire. Held, that the filing of the lien did not create an encumbrance within the meaning of the condition, and that the policy was not avoided thereby.<sup>3</sup>

§ 12. **Attaches only to Real Estate.**—The lien is intended to affect only real estate, and not personal property. It attaches to the land, in consequence of the incorporation of labor and materials in the building erected, which have become part of the land itself. So an administrator cannot deduct, from rents collected by him, sums paid by him to discharge mechanics' liens, as they are charges upon the real estate itself, and not on the rents and profits.<sup>4</sup> If the building should be destroyed, removed, or in any manner severed from the land, it ceases to be real estate; and, the land being none the better for the improvement, the equity of the mechanic, which arises from the increased value imparted by his labor, no longer existing, the lien itself ceases. Under a statute which provided "that every building hereafter erected or built shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected," it was held that it only intended to create liens on land, or what in construction of law is land, and not on merely movable property. This act did not intend to give a lien on labor not performed upon the land on which it is to be a lien, nor on materials before they were made land. It did not mean to give a lien on materials while they were yet movable, nor until they had become realty. As soon as the materials were converted into

<sup>1</sup> Cogel v. Mickow, 11 Minn. 475.

<sup>2</sup> 24 Supr. Ct. (N. Y.) 467; affirmed 82

<sup>3</sup> Quimby v. Sloan, 2 E. D. Smith (N. Y.) 594.

<sup>4</sup> Kimball v. Sumner, 62 Me. 305.

<sup>5</sup> Green v. Homestead Fire Ins. Co.,

land, then the land was seised by the lien by reason of the building, and the building because it was part of the land. And from thence it follows that, if the land and the building by any chance become separated, the lien is lost on both: the land, because it has lost the building and the increased value given to it; and the building, because it is separate from the land.<sup>1</sup> The same doctrine, where a similar statute enacted that "the lien of such debt shall extend to the ground covered by such building," was held, as follows: The equity of a mechanics' lien upon a building is founded upon the labor and materials furnished by him in constructing it. Attaching itself to the building, and depending upon it for existence, the lien must necessarily share the fate of the building. No amount of labor or materials furnished for the erection of a building would create a lien, if no building should be erected. So if the building, after erection, should be destroyed by accident, the lien would be gone. The reason for binding the land is gone with the building. Any other construction would defeat one of the objects of the law, which was to promote the improvement of the country by encouraging mechanics and material-men to furnish labor and materials for erecting buildings. But, if the lien continue on the land after the improvement is destroyed, how are those who erect the new building on the premises to be protected? Their equity against it is undoubtedly superior to the claims upon the building that was destroyed. Under such a rule all further improvement on the premises might be prevented; and therefore, if the building for which the materials were furnished or labor done be consumed before a mechanics' lien is filed, the ground upon which such building was erected, and all future buildings upon it, are discharged from such lien.<sup>2</sup> Under the preceding statute a subsequent case decided that the lien attached to the building primarily, and to the land only incidentally, as necessary to the proper use and enjoyment of the building; and when the building ceased to exist, by having been destroyed by fire or other accident, the lien was gone, and *a fortiori* where such destruction precedes the entry of the lien. In such case the lien will not attach to the materials left remaining after the destruction of the building, nor to buildings erected as appurtenances to the main structure.<sup>3</sup> So in another case where the statute gives the lien on the building "and upon the lot upon which the same

<sup>1</sup> Coddington v. Dry Dock Co., 31 N. J. L. 477.

<sup>2</sup> Presbyterian Church v. Stettler, 26 Penn. 246.

<sup>3</sup> Wigton & Brook's Appeal, 28 Penn. 161.

shall stand," and the building erected is entirely blown down, so that no building stands on the lot, nothing but the *débris*, there is no lien.<sup>1</sup> But, on the other hand, it was held in two other States that a mechanics' lien is not terminated by the destruction of the building by fire, — that it may, notwithstanding, be enforced against the land on which it was situated,<sup>2</sup> or against the *débris*.<sup>3</sup> So in Iowa if the improvements are removed or destroyed, the lien still clings to the land.<sup>4</sup> So where the law was "that any person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting or repairing any building, shall have a lien upon the land for the amount due to him for such labor or materials," etc., the last rule was adopted; and although the entire materials, buildings, and improvements, on account of which the lien accrued, were removed, rendered worthless, or destroyed by accident, the lien still continued against the land. The condition of the rights of the parties was not changed by the severance from the freehold by means of fire. The lien being upon the land, it does not follow the materials furnished from place to place, though originally united, if they are subsequently severed. If, however, the property be severed from the freehold wrongfully, and sold for cash, which is encumbered by a lien, it does not destroy the lien. A court of equity, at all events, under such a statute would not allow its justice to be thus defeated.<sup>5</sup> That court, treating, wherever it is necessary, the money as it would the property, would follow it into the hands of the party who had converted the property into money, according to one of its most familiar principles.<sup>6</sup> Many States have recently, in order to secure the rights of mechanics as against prior encumbrancers, established the lien against the building alone, when the entire property is not sufficient to pay all the charges affecting it.

§ 13. **Lien attaches to Entire Property, and grows *Pari Passu*.** — The theory of the lien is, that the party furnishing materials for the erection or repair of buildings on credit retains his claim to them after they have gone into the building; and, to enable him to enforce it, his lien is spread over all the property with which the materials have become inseparably connected.<sup>7</sup> So one furnishing materials, for improvements on a mining claim, is not confined to the particular structure on which his materials are

<sup>1</sup> Schukraft v. Ruck, 6 Daly (N. Y.), 1.

<sup>2</sup> Freeman v. Carson, 27 Minn. 516.

<sup>3</sup> McLaughlin v. Green, 48 Miss. 175.

<sup>4</sup> [Clark & Co v. Parker, 58 Iowa, 509.]

<sup>5</sup> Steigleman v. McBride, 17 Ill. 300.

<sup>6</sup> Gaty v. Casey, 15 Ill. 189.

<sup>7</sup> Chapin v. Persse, 30 Conn. 461;

[Sontag v. Doerge, 14 Mo. App. 577.]

used, but has a lien on the whole mining claim.<sup>1</sup> So the lien for labor on any part of a manufacturing plant (laying its pipes in the streets, for example), attaches to the whole plant, lot, factory pipes, and all.<sup>2</sup> So in case of a railway, a laborer's lien is on the entire railroad in the State, and the whole fund derived from its sale.<sup>3</sup> But a person entitled to a lien on a railway for materials furnished for its construction, may in his notice of a lien confine his claim to that portion or section of the road in the construction of which his material was used.<sup>4</sup> In Georgia a mechanic has a lien only on the improvement he helped to make and the material he put into a building, and a verdict extending the lien over the whole premises, land and all, is erroneous.<sup>5</sup> There is nothing to prevent the creation by statute of a lien on improvements, without its extension to the realty, and give preference to the same as against a prior mortgage on the land.<sup>6</sup> When it is made by statute to commence with the building, it progresses with the progress of the erection *pari passu*. The lien is thus inherent in and coextensive with the work and materials.<sup>7</sup> Every part of the work is done, and all the materials are furnished subject to it.<sup>8</sup>

<sup>1</sup> [Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 512.]

<sup>2</sup> [Steger v. Arctic Refrig. Co., 89 Tenn. 453, citing Brooks v. Ry. Co., 101 U. S. 443; Beatty v. Parker, 141 Mass. 523.]

<sup>3</sup> [Farmers L. & T. Co. v. Canada, &c. R. Co., 127 Ind. 251, 258, 262; see § 202.]

<sup>4</sup> [Giant Powder Co. v. Oregon Pac. Ry. Co., 42 Fed. R. 470.]

<sup>5</sup> [Gaskill v. Davis, 66 Ga. 666.]

<sup>6</sup> [Turner v. Robbins, 78 Ala. 592.]

<sup>7</sup> Steigleman v. McBride, 17 Ill. 300.

<sup>8</sup> Nazareth Lit. & Ben. Inst. v. Lowe, 1 B. Mon. (Ky.) 258.

## CHAPTER III.

## CONSTRUCTION OF LIEN LAWS.

§ 14. Interpretation must conform to Statute and General Rules.<sup>1</sup>

—The decisions in each State must conform to its own mechanics' lien law.<sup>2</sup> The federal tribunals, in matters of lien, are bound by the decisions of the highest court of a State in interpreting its own statute.<sup>3</sup> There is no distinction to be observed in the construction of statutes creating these liens, and other expressions of legislative will. The general rules adopted to discover and interpret the intention of laws are also applicable.<sup>4</sup> Thus, the whole law on the subject of mechanics' lien must be read together when interpreting the rights of parties under any of its provisions.<sup>5</sup> Again, it has been declared that, as acts in relation to mechanics' lien establish a system altogether out of the course of the common law, when points arise evidently not foreseen by the legislature, and upon which the statutes have not spoken, the grounds of decision to be resorted to must be the general scope and spirit of the enactment, the analogy of cases which have already been settled, and such considerations of policy as may be supposed to have had their influence on the minds of the law-makers, and to aim at such results as will most effectually promote the interest and security of those classes of men whom the system was designed to favor.<sup>6</sup> Upon a doubtful question of construction, the argument from inconvenience has great force.<sup>7</sup> As when the whole of enactments are considered in connection, and it is impracticable to carry out a particular intent by any procedure provided by the statute, or where absurd consequences in many supposable cases would result, these circumstances are sufficient to determine the judgment of the

<sup>1</sup> This section is cited with approbation in *Ex parte Schmidt*, 52 Ala. 256.

<sup>2</sup> *Collins v. Mott*, 45 Mo. 100.

<sup>3</sup> *Livingston v. Moore*, 7 Pet. 542.

<sup>4</sup> *Hatch v. Coleman*, 29 Barb. N. Y.) 201; *La Crosse & Mil. R. R. v. Vander-*

*pool*, 11 Wis. 119; *Kirby v. McGarry*, 16 id. 68; *Dame's Appeal*, 62 Penn. 417.

<sup>5</sup> *Seitz v. U. P. R. Co.*, 16 Kan. 140; *Geiger v. Hussey*, 63 Ala. 343.

<sup>6</sup> *Norris's Appeal*, 30 Penn. 122.

<sup>7</sup> *Dame's Appeal*, 62 Penn. 417.

Court.<sup>1</sup> So where an injustice would result from the construction of an act, it should not be adopted without the most explicit language. Thus, if a law provide that after its passage, "no claim of a mechanic, filed in pursuance of a previous act, should continue to be a lien for a longer term than five years from the day of filing the same," etc., it does not apply to claims which had been filed before the passage of the act, as it might give to some of the liens then entered only a month or day for their enforcement, or even, if the five years had expired, abolish them entirely.<sup>2</sup> But in no case is it competent for the judiciary to set up its views of the general policy of the public against those of the legislature, and, disregarding what may be considered unwise legislation, exert any controlling influence in preventing a fair and liberal interpretation of the remedy contemplated and provided by the legislature.<sup>3</sup>

§ 15. Courts cannot extend the Lien to Cases not provided for.<sup>4</sup>—The courts can in no instance, under the guise of interpretation, assume legislative functions, and extend the privileges conferred by statute to cases not falling within its provisions. These privileges conferred on mechanics, deriving their efficacy entirely from positive enactment, cannot be carried beyond the extent of the grant, either as to place or party.<sup>5</sup> As where a law extended the lien to "towns," it does not include cities.<sup>6</sup> Nor will there be a lien for materials or work supplied to a mine, when the law mentions only "mining claims," and says nothing about *mines*; so it was held in *Williams v. S. C. Mining Association*.<sup>7</sup> But there were other grounds of decision in this case, and, in a later one, the court held that the intent of the legislature was to give any one who performs labor in any pit, shaft, or gallery of a mine, a lien on the whole property.<sup>8</sup> The law in question was this, "Mechanics, material-men, artisans, architects, and laborers of every class performing labor upon or furnishing material to be used in the construction, alteration, or repair, of any mining claim, building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished material, for the

<sup>1</sup> *Greenough v. Nichols*, 30 Vt. 768.

<sup>2</sup> *Mustin v. Van Hook*, 3 Whart. (Penn.) 574.

<sup>3</sup> *Dame's Appeal*, 62 Penn. 417.

<sup>4</sup> This section is cited with approbation in *Ex parte Schmidt*, 52 Ala. 256; *Barnard v. McKenzie*, 4 Col. 253.

<sup>5</sup> *Brady v. Anderson*, 24 Ill. 110.

<sup>6</sup> *Rafter v. Sullivan*, 13 Abb. Pr. (N.Y.) 262.

<sup>7</sup> [*Williams v. S. C. Mining Ass.*, 66 Cal. 193, 195. A strict construction, — unnecessarily strict.]

<sup>8</sup> [*Helm v. Chapman*, 66 Cal. 291.]

value of such labor done and material furnished. This lien shall not be affected by the fact that no money is due or to become due, on any contract made by the owner with any other party.”<sup>1</sup> Where a proceeding on a mechanics’ lien was instituted under an act extending the law to the village of Lawrenceville, and the building, though properly described in the *scire facias*, was proved on the trial to be upon an out-lot adjoining it, the lien did not attach; neither would it extend to a village without a name.<sup>2</sup> The judiciary have also no power to amend a statute, or supply an evident mistake, notwithstanding the whole purpose of the law may in consequence be defeated; as where it was necessary that the notice of lien be served on “a town-clerk of the town where the property is situated,” and there was no town-clerk, though served on the county clerk, the lien failed. The county clerk’s office and the office of the city might have been appropriate places to file notices to create liens under the acts; but the legislature not thinking fit to designate them for that purpose, no one would, after reading the acts, think of looking in either of these offices for notices designed to create liens and charges upon real property, and the courts have no power to supply the deficiency.<sup>3</sup>

§ 16. **Liberally construed.**<sup>4</sup>—Among the decisions of the various States, there is an apparent conflict as to what should be deemed the policy of the law applicable to these liens, and the true spirit in which these statutes should be interpreted. Adjudications will be found declaring it to be against the genius of government to make distinctions between its citizens, or to prefer one class by granting them special privileges in derogation of the rules of common law,<sup>5</sup> and consequently these laws should be construed strictly; there are others equally numerous to the effect that correct policy dictates the fostering of this remedy for purposes of improvement of the country and the protection of often unlettered men, and that a free interpretation should be given them in favor of the mechanic.<sup>6</sup> It will be found, however, on a comparative examination, that courts have, with scarcely an exception, adopted either one or the other line of decision, according as the statutes of the particular State were themselves equitable and just. If they bore with unnecessary

<sup>1</sup> [§ 1183, Cal. Code of Civ. Procedure.]

<sup>2</sup> *Tilford v. Wallace*, 3 Watts (Penn.), 141.

<sup>3</sup> *Rafter v. Sullivan*, 13 Abb. Pr. (N. Y.) 262; *Cheney v. Wolf*, 2 Lans. (N. Y.) 188.

<sup>4</sup> This section is cited with approbation in *Ex parte Schmidt*, 52 Ala. 256.

<sup>5</sup> [See end of § 19.]

<sup>6</sup> *Barnes v. Thompson*, 2 Swan (Tenn.), 313; *Buck v. Brian*, 2 How. (Miss.) 880.

severity upon others in favor of the mechanic, and palpable injustice resulted, they have uniformly declared they should not be aided by construction, and a strict interpretation should be placed upon the laws. If, on the other hand, they have secured the laborer the result of his toil and capital, with a due regard to the rights of all, constant expressions are to be found in the reported cases, declaring they should be favored. Indeed, it will be observed that all practically agree the theory is beneficent, and, when the spirit and purpose of the law is to do substantial justice to all parties who may be affected, the statute should be fairly construed so as to advance the remedy,<sup>1</sup> and accomplish the ends of justice.<sup>2</sup> Essential departures, however, from its plain and obvious requirements will nevertheless be fatal,<sup>3</sup> but it is sufficient if there is a substantial compliance, in good faith with its provisions.<sup>4</sup> This liberality of construction which courts have believed themselves justified in adopting, applies principally to the relief of mistakes of procedure, when the case falls clearly within the provisions of the statute.<sup>5</sup> Statutory liens must conform exactly to the conditions of the law. But when they once attach the process will be liberally construed.<sup>6</sup> When the law provides that the contractor shall have no lien unless he gives the owner a statement of names and amounts due sub-contractors, a waiver of this statement by the owner will not save the lien.<sup>7</sup> Mechanics' liens are entirely the creation of statute, and controlled by its provisions. Courts cannot extend the lien to cases not provided for by the legislature, but when the conditions of creation are once satisfied and a lien arises, courts will be very liberal in preventing the loss of the lien, if it can be done without injustice or a clear departure from the legislative intent.<sup>8</sup> Although accuracy in matters of procedure ought to be carefully attended to, yet, as claims are frequently filed by mechanics and material-men themselves, it would lead to injustice to hold that every mistake, however trifling, should avoid the lien. Only such as are calculated to mislead others should destroy the claim, if there has been a substantial compliance.<sup>9</sup> And, for this purpose, certainty to a common intent is all that can be reasonably required.<sup>10</sup> A lien

<sup>1</sup> *Oster v. Rabeneau*, 46 Mo. 595; *Putnam v. Ross*, 46 Mo. 337; *Skyrme v. Occidental Mill Co.*, 9 Nev. 219.

<sup>2</sup> *Sharp v. Spengler*, 48 Miss. 360.

<sup>3</sup> *Greene v. Ely*, 2 *Greene* (Iowa), 508.

<sup>4</sup> *White v. Chaffin*, 32 Ark. 69.

<sup>5</sup> [*Buckley v. Taylor*, 51 Ark. 302, 307.]

<sup>6</sup> [*Sheridan v. Cameron*, 65 Mich. 680.]

<sup>7</sup> [*Burnside v. O'Hara*, 35 Ill. App. 150, citing *Phillips*, § 9.]

<sup>8</sup> [*Swift v. Martin*, 20 Bradw. 515.]

<sup>9</sup> Text affirmed in *Murray v. Rapley*, 30 Ark. 573.

<sup>10</sup> *Ewing v. Barras*, 4 W. & S. (Penn.) 468.



will not be defeated on a mere technicality that injures no one.<sup>1</sup> "A lien once acquired should not be defeated by technicalities, when no rights of others are infringed, and no express command of the statute disobeyed."<sup>2</sup> Substantial compliance with the statute is enough, and the law will be liberally construed to accomplish the purpose and intent of the legislature.<sup>3</sup> Substantial compliance is the test, — substantial compliance is sufficient and nothing less than substantial compliance will answer.<sup>4</sup> In fact a mechanic has a right to security in the thing that contains his labor, — the law is in the truest sense remedial, not in derogation of right, but in recognition and enforcement of it.<sup>5</sup> I am unable to see any reason why the conditions under which a lien is to arise should not be liberally construed as well as the conditions for preserving one that has arisen, and if the cases already cited, and others throughout this work, are examined upon their facts, it will be found that a liberal construction is given to all the provisions of law, creative as well as preservative, except where the provision is burdensome, and passes beyond the bounds of reason, justice, or common sense.<sup>6</sup>

§ 17. **Illustrations of Liberal Construction.**<sup>7</sup> — Illustrative of the general proposition that the policy declared to exist depends upon the equity of the statute itself, we find that where a claim was sought to be impeached in consequence of a greater sum having been innocently claimed to be due in the account filed, than was really owing, the object of these statutes was held to be of an equitable character and beneficent, and that the same ought to be liberally construed, for the furtherance and attain-

<sup>1</sup> [Chair Co. v. Runnels, 77 Mich. 105, 110.]

<sup>2</sup> [Emery, J., in Durling v. Gould, 83 Me. 134, 137; see also Wescott v. Bunker, 83 Me. 499, 507.]

<sup>3</sup> [Malter v. Falcon M. Co., 18 Nev. 209; McAdow v. Sturtevant, 41 Mo. App. 220; Hayden v. Wulffing, 19 Mo. App. 353, 357; De Witt v. Smith, 63 Mo. 263; Vandergriff's Appeal, 83 Pa. St. 127, 131; Hazard Co. v. Byrnes, 21 How. Pr. 189; Winslow v. Urquhart, 39 Wis. 268; Willamette Co. v. Remick, 1 Ore. 169; Gallaher v. Karns, 27 Hun, (N. Y.) 375; Whitford v. Newell, 2 Allen, 424; Railroad Co. v. Brown, 14 Kan. 557; Pool v. Wedemeyer, 56 Tex. 287, 289; White Lake Lum. Co. v. Russell, 22 Neb. 126; Steger v. Arctic Refrig. Co., 89 Tenn. 453; Holly v. Alloway, 10 Lea, 524; Railway Co. v. McCoy, 42 Oh. St. 251, 253; Bullock v. Horn, 44 Oh. St. 420. The words of the statute need not be followed if the substance is

preserved. "He who considers merely the letter of an instrument goes but skin deep into its meaning." Hobbs v. Spiegelberg, 3 N. Mex. 222, 223.]

<sup>4</sup> [Russ. Lumber Co. v. Garrettson, 87 Cal. 589; Reindollar v. Flickinger, 59 Md. 469, 471; Wehr v. Shryock, 55 Md. 336; Hagman v. Williams, 88 Cal. 146, 151, (citing Tredimick v. Mining Co., 72 Cal. 73; Malone v. Big Flat M. Co., 76 Cal. 578; Jewell v. McKay, 82 Cal. 144; Chandler v. Hanna, 73 Ala. 390; Greeley v. Harris, 12 Colo. 226, 229, citing Phillips, §§ 16, 338; Cannon v. Williams, 14 Colo. 21, citing Phillips, § 16; Rico R. & M. Co. v. Musgrave, 14 Colo. 79.)]

<sup>5</sup> [See Knutzen v. Hansen, 28 Neb. 595.]

<sup>6</sup> [See, for example, Mining Co. v. Cullins, 104 U. S. 176.]

<sup>7</sup> This section is cited with approbation in *Ex parte Schmidt*, 52 Ala. 256.

ment of such object.<sup>1</sup> Again, where subsequent purchasers, after notice duly filed by mechanics, sought to obtain priority over the latter, the claims of mechanics were declared to be favored in law.<sup>2</sup> To the same effect, where the lien is given in favor of laborers, as against an owner with funds of the contractor in his hands, which he seeks to appropriate to the liquidation of a matter having no reference to the contract for building, the object of the law was announced to be the protection of the former, whose equities were superior to the owner.<sup>3</sup> So a similar statute, giving to sub-contractors only a right of action against an owner with funds in his hands due the contractor, was held to be highly remedial, and should be liberally construed.<sup>4</sup> A mortgage had been given on land, but through negligence was not recorded; and the lien of the mechanic had attached for building, without notice thereof. It being inequitable to give an encumbrancer a lien on a building he did not contract for, it was decided that the lien of the mechanic ought to be favored, as it was the object of the lien laws to give a security on the specific thing.<sup>5</sup> Having in view this same equitable principle, that a party has a superior right to be secured out of the thing his labor has created, a court in interpreting a law which, after giving a lien on both building and land, provided "that such lien on the *land* shall only take effect as to purchasers, etc., from the time of the recording of the contract," decided that, although the mechanic may lose his lien as against land by a sale without notice, he may enforce his right of lien against the building or other improvements erected or repaired by his labor or with his materials, and that the claims of mechanics were to be favored, and a liberal interpretation to be given in their behalf.<sup>6</sup> The object of lien laws is to make the pay of those whose labor has gone to enhance the value of the erection, prompt and secure in all cases against both the misfortunes and the possible dishonesty of their employers, and the construction to be adopted is that which, without violating the true signification of the language employed, shall best promote the object and efficiency of the statute in all its parts.<sup>7</sup> So where a statute declared that "the railroad to be built by said company shall be pledged and bound for the redemption of the notes and bills issued by or from said company, and for the redemption of

<sup>1</sup> Thomas v. Huesman, 10 Ohio St. 152.

<sup>2</sup> Buck v. Brian, 2 How. (Miss.) 880.

<sup>3</sup> Develin v. Mack, 2 Daly (N. Y.), 94.

<sup>4</sup> Gilman v. Gard, 29 Ind. 291.

<sup>5</sup> Mitchell v. Evans, 2 Browne (Penn.), 329.

<sup>6</sup> Buchanan v. Smith, 43 Miss. 90.

<sup>7</sup> Collins v. Devereux, 72 Me. 422.

the same," it created a paramount lien on that portion of the road actually built by the company, but did not prevent its officers from contracting to give a lien on another portion built by contractors which was superior to the lien of the bill-holders, — the contractors having a natural justice to be paid out of the thing they themselves have created.<sup>1</sup> The same doctrine was announced in a contest between a garnisher and sub-contractor.<sup>2</sup>

§ 18. **Strictness of Construction dependent upon Inequity of Statute.**<sup>3</sup> — On the other hand, if undue advantages are secured to the mechanic or material-man, without reference to the just rights of owners and others, courts have adopted a strict construction of the terms of the law. Thus, so far as a lien law operates to charge the lands of a party with a debt not contracted by him or for his ultimate benefit, it is declared it should be strictly construed.<sup>4</sup> So where a statute gave a lien on a building for debts imposed by a contractor, and thus charged the property of one man with the debt of another, the effect of which was that an owner, who had paid the contractor in full for the erection of the building and for all the materials used in its construction, might nevertheless have his property charged by the default of the contractor, with the repayment of the debt, such a law was considered as giving a preference to one class of creditors over another. The man, it was said, who has furnished a brick, or a plank, or a stone, for the erection of the building, or who has labored a day in its construction, is secured his remuneration in full, while those who have furnished provisions for the owner and his family, who have supplied them with the necessaries of life, or who have toiled in their service, are deprived of all means of recompense until the favored creditors are satisfied. It gives to the favored creditor a remedy not only against his debtor, but against an innocent third party, with whom he has never contracted, and for whom he has never labored. It gives him a cumulative remedy, which, if enforced, may compel the owner to pay a debt which he has once satisfied in full. These suggestions show that such a statute, although to be enforced within its letter, is not of that purely remedial character which calls for a peculiarly liberal construction at the hands of the court; and therefore, where a law authorizing such proceedings against "the debtor and owner and their executors

<sup>1</sup> Collins v. Central Bank, 1 Ga. 435.

<sup>2</sup> Tuttle v. Montford, 7 Cal. 358.

<sup>3</sup> This section is cited with approbation in *Ex parte Schmidt*, 52 Ala. 256, [and in

*Finané v. Las Vegas Hotel*, 3 N. Mex. 256.]

<sup>4</sup> *Associates of Jersey v. Davidson*, 5 Dutch. (N. J.) 415.

or administrators " was repealed by one which authorized suit "against the builder and owner " only, the court said that there may have been design on the part of the legislature in restricting this peculiar remedy to the builder and owner, to the exclusion of their representatives, and that it was not difficult to conceive reasons why this should have been done. Neither a sound construction of such a statute nor the promotion of the ends of justice requires that the statutory remedy should be extended beyond the obvious design and clear requirements of the law.<sup>1</sup> Again, in construing a similar statute which secured a lien to the sub-contractor and material-man, notwithstanding payment by the owner, the court say there must be at least a substantial compliance with all requirements. This observance is absolutely essential to the safety of owners, purchasers, and other lien creditors, and often furnishes the only *data*, by which, in case of dispute, they may be enabled to search out the truth. The clew may in many cases be an imperfect one; but in this consideration will be found additional reason why it should be afforded to those who otherwise would be left to grope in obscurity, without even a glimmer of light by which to direct research. As the laws call for nothing unreasonable at the hand of him who would fasten an encumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions.<sup>2</sup> So an act authorizing property to be encumbered without or against the consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used.<sup>3</sup> In another case it was declared that although it may be conceded to be competent for the legislature, by an arbitrary expression of its will, to create a lien to the extent of the indebtedness of the proprietor to the first contractor, and to transfer it, by a sort of legislative assignment, together with the indebtedness to the sub-contractor for his security, still, when anything of this sort is claimed to have been done, the provision is so unusual and contrary to what is accustomed to be considered a more reasonable course of legislation that courts will examine it with care before they give it such effect, and will require clear and unequivocal language in a statute to authorize them so to construe it.<sup>4</sup> Statutory provisions permitting the

<sup>1</sup> Ayres v. Revere, 1 Dutch. (N. J.) 474; Parker v. Anthony, 4 Gray (Mass.), 289; Greenough v. Nichols, 30 Vt. 768.

<sup>2</sup> Noll v. Swineford, 6 Penn. 187.

<sup>3</sup> Mushlitt v. Silverman, 50 N. Y. 360.

<sup>4</sup> Consociated Pres. Soc. v. Staples, 23 Conn. 544.

summary enforcement of private charges, such as mechanics' liens, on property without the assent of the owner or judicial sanction, cannot be extended in their operation beyond the plain and fair sense of the terms in which they are expressed. A title, therefore, under the mechanics' lien law, is purely statutory, and its validity depends on an affirmative showing that every essential statutory step in the creation, continuance, or enforcement of the lien has been duly taken.<sup>1</sup> Thus where a lien was secured to "all lumber merchants, etc., furnishing materials for the construction of any building," it was held that it must be averred and proved that the lumber was furnished for the building by the express terms of the contract, and it was not sufficient to show it was used in the building. Such acts, giving rights in derogation of common law, never contemplated that a lumber merchant should have the right of following the materials which he has sold to another in general terms, and obtaining a lien upon any building to which the materials had been applied.<sup>2</sup>

§ 19. **Instances of Strict Construction.** — The multiplication of liens, especially on personal property, being a fruitful source of litigation, and prejudicial not merely to the public, but even to those intended to be benefited,<sup>3</sup> where a mere temporary erection, subject to be constantly changed, was sought to be brought within the terms of the lien law, it was decided that statutes extending mechanics' liens to limits contrary to the general policy of the public are to be strictly construed.<sup>4</sup> So, where the lien of the mechanic is primarily created for his protection, as a personal right, when the aid of the court is invoked by an assignee, he must clearly show that the statute authorizes the transfer.<sup>5</sup> For a privilege enjoyed by one class of community, above all others, to be available, the party seeking to enforce it should bring himself within the terms of a statute which is opposed to common right and should be strictly construed.<sup>6</sup> Again, where the notice of the laborer, etc., to the owner should contain a statement that the amount is due "over and above all payments and set-offs," the remedy was considered an extraordinary one, to be strictly complied with.<sup>7</sup> In Georgia, the foreclosure of a laborer's lien is a summary remedy, and the law

<sup>1</sup> *Wagar v. Briscoe*, 38 Mich. 587.

<sup>2</sup> *Bottomly v. Grace Church*, 2 Cal. 90.

<sup>3</sup> *Dame's Appeal*, 62 Penn. 417.

<sup>4</sup> *Esterley's Appeal*, 54 Penn. 192.

<sup>5</sup> *Roberts v. Fowler*, 4 Abb. Pr. 263; s. c. 3 E. D. Smith, 632.

<sup>6</sup> *Cook v. Heald*, 21 Ill. 425.

<sup>7</sup> *Davis v. Livingston*, 29 Cal. 283.

will be strictly construed.<sup>1</sup> Some cases declare in general terms that mechanics' lien laws are in derogation of common law, and are therefore to be strictly construed.<sup>2</sup> The plaintiff must bring his case strictly within the statute.<sup>3</sup> The construction of the lien law is to be strict, but not so illiberal or artificial as to impair the remedy.<sup>4</sup>

§ 20. **Construction as to Purchasers, etc.** — Equal protection seems to be accorded *bona fide* purchasers, encumbrancers, and creditors in the construction of these laws. A mortgage had been given and duly recorded, and a mechanic claimed priority; it was adjudged that when a party claims the benefit of the lien, he must show he has strictly complied with all the prerequisites imposed by the statute, the aid of which he invokes; and, however just and equitable may be its operation between the owner and mechanic or material-man, care must be taken that it be not extended beyond its legitimate scope, to the prejudice of third persons, who have no means of knowing of the existence of such encumbrances, save such as the statute points out.<sup>5</sup> So, where an ambiguity occurred in a notice, and application was made to correct it, the statute was to be strictly complied with as against third persons.<sup>6</sup> A lien will not be enforced against a *bona fide* purchaser for value without notice, unless the requirements of the lien law have been *strictly* complied with.<sup>7</sup> It is otherwise if the purchaser knew of the lien and promised to pay the claim.<sup>8</sup> In a case where it was sought to subject the property of a married woman to the payment of the debt of a contractor, the court decided that while mechanics' lien laws should not be so construed as to defeat their beneficial purposes, yet so far strictly to the extent of keeping claimants within the plain requirements of the law, as they confer privileges, which could not be enjoyed but for the statutes, and upon the established principle that where a new and special benefit is conferred upon the individual citizen by a legislative enactment, a strict construction should be given to it.<sup>9</sup> The policy of the law favoring an equal distri-

<sup>1</sup> [Hinton v. Goode, 73 Ga. 233; Richardson v. Langston, 68 Ga. 658.]

<sup>2</sup> [Butler v. Gain, 128 Ill. 23, 27, citing Belanger v. Hersey, 90 Ill. 70; Seiler v. Schaefer, 40 Ill. App. 74.]

<sup>3</sup> [Ruggles v. Blank, 15 Bradw. 436; Legnard v. Armstrong, 18 Bradw. 549; Finane v. Las Vegas Hotel & Imp. Co., 3 N. Mex. 256, citing Phil. § 18; Houghton v. Same, Id. 260.]

<sup>4</sup> [Stout v. Sower, 22 Ill. App. 65, 75, citing Davis v. Alvord, 94 U. S. 545, in

which case, however, the court says that the statute of liens is to be "liberally construed to afford the security intended."]

<sup>5</sup> The Farmers' Bank v. Winslow, 3 Minn. 86.

<sup>6</sup> Wade v. Reitz, 18 Ind. 307.

<sup>7</sup> [Anderson v. Bingham, 1 Colo. App. 222, 225, 227, citing Phillips, § 378 *et seq.*]

<sup>8</sup> [Martin v. Simmons, 11 Colo. 411; Anderson v. Bingham, 1 Colo. App. 222, 226.]

<sup>9</sup> Ward v. Black, 7 Phila. 342.

bution of the effects of a failing debtor among his creditors, a statute which gives a preference to certain of them in the nature of a lien, will be construed with reasonable strictness.<sup>1</sup> So, where the lien of the mechanic is not of record, and rests upon a mere verbal agreement, and the time when it takes effect is often doubtful, and dependent on parol evidence, the lien is a peculiar one and must be taken strictly as against creditors of owners of property, and purchasers.<sup>2</sup>

§ 21. **Construction when Statutes declared to be Remedial.**—To counteract what may have been supposed to be unfriendly adjudication, it has been required in some States that the “mechanics’ lien acts should be considered as remedial, and as if conferring general jurisdiction;” yet such enactments do not thereby dispense with the forms of pleading recognized in courts having jurisdiction, when administering remedial laws.<sup>3</sup> Although the legislature may require that mechanics’ lien laws shall receive a liberal construction, it is nevertheless necessary that they should be substantially complied with.<sup>4</sup> In another case, notwithstanding a statute disclosed an intent that proceedings under it should be prosecuted in a manner to exempt them from technical refinement, yet as the remedy looks to a somewhat summary subjection of real property under loose verbal arrangements and to the passage and founding of titles to land as the result of compulsory proceedings, all matters of substance, and every step in any way essential to the security of rights and titles, and the preclusion of future strife and contention ought to be strictly insisted upon.<sup>5</sup> So, if the notice of the sub-contractor or material-man should state “his intention to claim the benefit of the lien,” an omission of this statement in the notice is a fatal defect, although the law is declared to be “remedial;” for, notwithstanding the words of the law must be substantially complied with, in a case like the above, where the precise words are furnished by the statute, and are wholly omitted, the omission is fatal.<sup>6</sup> To the same effect, where the law provides that any person who shall do work or furnish materials may compel payment to himself, if he “shall give notice of the same in writing to the owner,” a notice to the owner which merely states the intention “to claim the benefit of the lien provided by the lien laws for materials furnished and work done for and about the erection and construction” of the described building, saying

<sup>1</sup> Chapin v. Persse, 30 Conn. 461.

<sup>2</sup> Luter v. Cobb, 1 Coldw. (Tenn.) 525.

<sup>3</sup> Kees v. Kerney, 5 Md. 419.

<sup>4</sup> Plummer v. Eckenrode, 50 Md. 232.

<sup>5</sup> Willard v. Magoon, 30 Mich. 273.

<sup>6</sup> Hess v. Poultney, 10 Md. 257.

nothing of the nature and kind of materials, nor of the amount claimed, and making no reference to a claim filed, is not a sufficient notice under the above provision. It gives no useful information to the owner, by informing him of what amount he would be entitled to retain out of the contractor's claim.<sup>1</sup> So a declaration on the part of the legislature that the act is "to receive a liberal construction as a remedial act," will not include coal-cars under a statute that "every machine hereafter to be erected, constructed, or repaired shall be subject to a lien in like manner as buildings."<sup>2</sup> Again, where a statute, in a State that has always favored the claims of mechanics, extended a lien to "all improvements, engines, pumps, machinery, screens, and fixtures erected or put by tenants of leased estates on lands of others," the term "improvement" does not mean ordinary houses, but works on colliery, oil-leases, etc.<sup>3</sup> A statute providing a remedy for the enforcement of a common-law lien is remedial, and is to be liberally construed.<sup>4</sup>

§ 22. **Pro- and Retro-spective Laws.** — The mechanics' lien laws having established a system entirely new in the rights secured, and without precedent in its mode of procedure, experience demonstrated, in most of the States, that defects had to be remedied and imperfections supplied. The legislature possessing control over the remedy, both as to past and future contracts, and frequently supplementing the laws by extending the remedy, after contracts had been entered into or work performed under existing statutes, cases of construction have arisen, in which it has been important to determine whether a particular statute operated exclusively prospectively or applied as well to past transactions. The presumption is, that all statutes are to operate prospectively, and were not made to impair vested rights, and a retroactive effect is never to be given, unless required in the most explicit terms,<sup>5</sup> and the intention of the legislature is unmistakable.<sup>6</sup> A claim of lien cannot be maintained for work done under a contract made before the lien law took effect, although the *work* was done after the law came into effect.<sup>7</sup> Although, in regard to civil remedies, laws may be enacted which shall have a retroactive operation, the general rule is that they are not to be construed to produce that effect, unless it was

<sup>1</sup> Thomas v. Barber, Id. 380.

<sup>2</sup> New England Car Spring Co. v. Balt. & Ohio R. R., 11 Md. 81.

<sup>3</sup> Schenley's Appeal, 70 Penn. 98.

<sup>4</sup> [Watts v. Sweeney, 127 Ind. 116, 122.]

<sup>5</sup> Plumb v. Sawyer, 21 Conn. 351; [McCarty v. Havis, 23 Fla. 508.]

<sup>6</sup> Vanderpool v. LaCrosse & M. R. Co., 44 Wis. 652.

<sup>7</sup> [Bourgette v. Williams, 73 Mich. 208, 216.]



manifestly the purpose of the legislature that they should. Thus, where a law simply declared that "mechanics have a prior lien upon the lot of land on which buildings are erected by them," etc., it was held to have no retroactive effect to charge it in the hands of a purchaser.<sup>1</sup> So far as a statute is purely remedial it will be applied retrospectively to cases then pending, but so far as it would create new rights upon past transactions or revive dead ones resting upon such transactions, it will be construed prospectively only unless the mandate is imperatively and validly to the contrary. For example, the act of June 11, 1879, extending the right of amendment, will not operate the revival of a mechanics' lien in which the original claim was defective, and for two years before the said act the lien had been dead and beyond amendment under the prior law which created it.<sup>2</sup> In a Delaware case, however, the court said that even a purely remedial statute is not to have any operation anterior to the enactment of it without an intention clearly indicated in the terms of it, that it shall have that effect.<sup>3</sup> Accordingly it was held, where a notice of lien was filed, and proceedings commenced prior to a law that required "liens shall in all cases cease after one year, unless by order of court the lien is continued," it did not apply, but that the lien continued after the expiration of the year, and until the rendition of the judgment.<sup>4</sup> This rule has a controlling influence when the statute operates to the injury of vested rights. As a qualification, however, to this principle, it has been held that where the interests of the community demand statutory relief when judicial procedure is defective, laws passed in aid, though retrospective in character, and operating injuriously in some individual cases, have no presumption against them.<sup>5</sup> The solution of the question whether the lien law is to apply to past as well as future contracts depends primarily upon the words of the law under interpretation, subject always to the provision that it does not infringe upon the constitutional limitation which prohibits the violation of contracts. Thus, a statute which provided that any "person who shall actually perform labor in erecting, etc., or shall furnish materials actually used for the same by virtue of any agreement with a consent of the owner thereof, etc., shall have a

<sup>1</sup> *Smith v. Kolb*, 58 Ala. 645.

<sup>2</sup> [*Fahnestock v. Wilson*, 95 Pa. St. 301, 303.]

<sup>3</sup> *Capelle v. Baker*, 3 Houst. (Del.) 344.

<sup>4</sup> *Fitzpatrick v. Boylan*, 57 N.Y. 433.

<sup>5</sup> *Calder v. Bull*, 3 Dall. 386; *Mann v. Eckford's Ex'rs*, 15 Wend. (N. Y.) 519; *Syracuse City Bank v. Davis*, 16 Barb. (N. Y.) 188.

lien," does not apply to contracts made before it took effect.<sup>1</sup> So where it was enacted that "any person who shall perform labor or furnish materials for erecting, etc., shall have a lien," it was prospective only in its operation, it could not enlarge or aid the rights of lien creditors who had secured by attachment their liens, which had accrued prior to its passage.<sup>2</sup> "All miners or other persons performing labor, etc., for any organized or incorporated company, etc., shall have a lien upon said lode or mine," etc. This law by its terms does not purport to give a lien for labor done before its passage. It was evidently the intention to give the lien only to secure the payment of wages for work done after its passage.<sup>3</sup> A law providing "that any person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting or repairing any building, etc., shall have a lien," etc., is not retrospective. When this is the first law giving a lien, a party furnishing labor or materials prior to its passage has none.<sup>4</sup> Again a statute "declared that the provisions shall be construed in all cases to apply to the construction of bridges;" it was held it did not operate retrospectively, so as to give a lien for materials furnished for a bridge constructed before its passage.<sup>5</sup> So where a statute declared "that thereafter there should exist" a right of redemption, in cases of mechanics' liens, it cannot be construed as affecting a decree, which cuts off the right of redemption, entered before the act went into effect. Such a decree, being proper at the time it was entered, would not, upon the act going into operation before the time fixed for the sale of the premises, thereby become erroneous.<sup>6</sup> A lien which attached before the act of March 11, 1875 (making absolute the inchoate interests of married women), is not affected by that act, though the foreclosure and sale are subsequent thereto.<sup>7</sup>

§ 23. **Subsequent Laws applicable to Existing Contracts.** — But where a statute provides that "any person who shall hereafter, by virtue of any contract, perform any labor," shall have a lien, it operates to authorize a lien to be created for work done since the act took effect, although under a contract made before that date. It does not, however, cover work done before the passage of the act. The effect, it was said, of applying such a statute to contracts in existence at the time of its passage, was no

<sup>1</sup> Donahy v. Clapp, 12 Cush. (Mass.) 440.

<sup>2</sup> Kendall v. Folsom, 35 Me. 198.

<sup>3</sup> Hunter v. Savage, 5 Nev. 153.

<sup>4</sup> Townsend v. Wild, 1 Colo. 10.

<sup>5</sup> Vanderpool v. La Crosse & M. R. Co., 44 Wis. 652.

<sup>6</sup> Knight v. Begole, 56 Ill. 122.

<sup>7</sup> Buser v. Shepard, 107 Ind. 418, 419.]

alteration of the contract to the prejudice of the owner or of the contractor. It did not affect the rights of either, but only provided a new remedy for the collection of a debt.<sup>1</sup> A subsequent law extended the lien to other classes of objects, "subjecting them to the provisions and regulations" of the prior act. The effect in such case was to make all the provisions of the old law part and parcel of the new, which were not repugnant, and which formed portions of the provisions that regulated the lien.<sup>2</sup> And where there was nothing in a statute which limited its operation to contracts made after its passage, but did limit the claim to work done after its passage, it was held nevertheless to apply to cases where the contract was made before its passage, if the labor was performed and the materials were furnished after such passage.<sup>3</sup> It neither altered nor impaired the owner's contract, and was therefore not unconstitutional.<sup>4</sup> Again, where labor was performed and materials furnished principally under a law which was unconditionally repealed by a statute which enacted "that every dwelling-house or other building, for the construction, erection, or repairs of which any person shall have a claim for materials furnished or services rendered, shall with the land," etc, "be subject to a lien," the prior liens were held to be preserved thereby, and this retrospective operation of the act could not be justly considered a subject of complaint.<sup>5</sup>

§ 24. **Statutes governing the Right and Remedy.**<sup>6</sup>—The rights of parties under mechanics' lien laws are to be ascertained and fixed by the law in force when the contract was made; but such rights are to be established and enforced by the law existing at the bringing of the suit.<sup>7</sup> In an Illinois case the court said "the terms upon which, and the manner in which, mechanics' liens shall be given and enforced, are governed by the laws in force when the mechanic seeks the benefit of the lien the law gives."<sup>8</sup> A statement in conformity with the law of 1889 for materials furnished before and after that law went into effect is good.<sup>9</sup> Where all the labor and material were furnished before the law took effect (Oct. 1, 1890), the old law as to lien-statements applied, though they were not filed until after that date. Where part of the material and labor was

<sup>1</sup> *Hauptman v. Catlin*, 4 Abb. Pr. (N. Y.) 472.

<sup>2</sup> *Gordon v. South Fork Canal Co.*, 1 McAllister (C. C.) 513.

<sup>3</sup> *Sullivan v. Brewster*, 1 E. D. Smith (N. Y.), 681.

<sup>4</sup> *Miller v. Moore*, Id. 739.

<sup>5</sup> *Mason v. Heyward*, 5 Minnesota, 74.

<sup>6</sup> [This section approved in *Pool v. Wedemeyer*, 56 Tex. 287, 296.]

<sup>7</sup> *Williamette v. Riley*, 1 Oreg. 183; *Andrews v. Washburn*, 11 Miss. 109. [See exception § 29, end.]

<sup>8</sup> [*Barton v. Steinmitz*, 37 Ill. App. 141. See § 29, end.]

<sup>9</sup> [*Tell v. Woodruff*, 45 Minn. 10.]

furnished after October 1st, the provisions of the new law applied.<sup>1</sup> Liens are controlled by the law in force when the lien accrued, both as to the contents of the statement and the time for filing it.<sup>2</sup> When work was done under a law that has been repealed the *proceedings* must be according to the new law.<sup>3</sup> When a new law goes into effect before notice is given, it must be given within the time, and in the manner prescribed by the new law if practicable.<sup>4</sup> If a lien law requiring notice to the employer is repealed during the work, and a new law enacted which does not require such notice, the whole lien may be enforced without such notice.<sup>5</sup> So where materials are furnished under a law requiring notice to be filed within sixty days after the last material was supplied, and fifty-seven days thereafter the said law was amended, so that no notice was necessary to establish a lien, it was held that the above lien was good without filing notice.<sup>6</sup> It would have been otherwise if the sixty days had run out before the law was amended. A law limiting the time for commencement of suit after filing the account, which was in force at the time of beginning such suit, must prevail over a law of limitation which existed at the time of filing the account. So that, where a lienor had at the time of doing the work nine months in which to bring his action, if a subsequent statute limited the time to ninety days, the lien will be lost unless brought within the latter period.<sup>7</sup> Where work had been done, and before the expiration of the time within which he might have proceeded to enforce his lien a new remedy was furnished, it was considered competent to proceed to its enforcement under the subsequent statute.<sup>8</sup> So, where a lien law is repealed unconditionally by a subsequent law which provides for the enforcement of the previous liens, a petition and claim under the repealed law is not valid against a subsequent encumbrancer.<sup>9</sup> When, however, a new lien law is entirely prospective in its operation, prior cases must be construed according to the acts in force when the liens accrued.<sup>10</sup> Or when a new statute contemplates simply cases to arise in the future, and there is no repeal of existing laws, proceedings instituted prior to the operation of the new law are to be governed by the

<sup>1</sup> [Wisconsin Brick Co. v. St. Peter St. Imp. Co., 46 Minn. 231.]

<sup>2</sup> [Hill v. Lovell, 47 Minn. 293.]

<sup>3</sup> [Seattle, &c. R. Co. v. Ah Kow, 2 Wash. Tr. 36, 43.]

<sup>4</sup> [Ibid.]

<sup>5</sup> [Ainslie v. Kohn, 16 Or. 363.]

<sup>6</sup> [Goodbub v. Estate of Hornung, 127 Ind. 182.]

<sup>7</sup> Forcht v. Short, 45 Mo. 377.

<sup>8</sup> Paine v. Woodworth, 15 Wis. 298.

<sup>9</sup> Willim v. Bernheimer, 5 Minn. 288.

<sup>10</sup> Church v. Davis, 9 Watts (Penn.), 304.

law in existence when the contracts were made.<sup>1</sup> So where a mechanics' lien law repealed all acts inconsistent with it, but was to act only on contracts thereafter to be made, contracts previously made might be governed by the former statute.<sup>2</sup> But where a new law provided for a lien and its enforcement, and repealed the previous law, providing that "rights acquired and liabilities incurred under the previous law shall not be affected by the repeal thereof," a lien growing out of a contract entered into before the passage of the later act, but not completed until after it took effect, should be prosecuted under the new act.<sup>3</sup> A contract was made and materials furnished while a lien law was in force, but notice of lien was not filed until a repeal of this law by a later statute, which provided a saving for all liens then existing. All subsequent acts and proceedings relating to the lien or its enforcement were nevertheless held to be governed by the repealing act.<sup>4</sup>

§ 25. **Repeal of Lien Laws.** — The repeal of a mechanics' lien law is to be determined by the rules ordinarily adopted in such cases. If there be no express repealing words, and the statutes are not absolutely inconsistent, or, if the subsequent law does not undertake to revise the whole subject embraced in the previous statutes, but only repeals certain parts, there is no repeal. So although the new statute extends the right of lien to other matters not embraced in prior statutes. Successive statutes of a State securing to mechanics and laborers liens for their labor and materials, are all *in pari materia*, and are to be construed together as forming one entire system, in which prior enactments, so far as they are consistent and necessary to the proper operation and enforcement of the liens intended to be secured by the statutes, are to be held to apply to all subsequent provisions on the same subject.<sup>5</sup> A general lien law will be construed in connection with a special law, when the latter enacts "that so far as the general law is inconsistent with this act, it be repealed."<sup>6</sup> A law will not be deemed a repeal of liens existing which substantially re-enacts a preceding law as to filing and enforcing the same. It will be considered simply as a consolidation of previous laws, when the tendency would be to destroy vested rights acquired under an old law.<sup>7</sup> The law in such case

<sup>1</sup> Evans v. Springer, 2 Miles (Penn.), 29.

<sup>2</sup> Connor v. Lewis, 16 Me. 268.

<sup>3</sup> Turney v. Saunders, 5 Ill. 527.

<sup>4</sup> McCrea v. Craig, 23 Cal. 522.

<sup>5</sup> Gilson v. Emery, 11 Gray (Mass.), 430.

<sup>6</sup> Nunes v. Wellisch, 12 Bush (Ky.), 366.

<sup>7</sup> Skyrme v. Occidental Mill Co., 7 Nev. 219; Steamship Co. v. Joliffe, 2 Wall. 458.

will be deemed to have suffered no interruption. But when the legislature, upon a subject which has previously received its attention, frames a new law identical with the first in some features, but differing widely in others, and expressly repeals the first act, it would be an extraordinary exercise of judicial power to declare the first act in force, notwithstanding such repeal. It is not sufficient that the repealed and repealing acts should have points of identity. The latter must be substantially the same as the former.<sup>1</sup> When the law says that a lien shall be enforced as innholders' liens on baggage, a repeal of the latter mode of remedy does not repeal or change the remedy under the lien law.<sup>2</sup> The effect of an amendment of a statute made by a subsequent statute declaring that such statute "shall be amended so as to read as follows," retaining a part of the statute amended and incorporating therein new provisions, is not to repeal the part of the statute continued in force from the first enactment.<sup>3</sup> A supplement to a lien law extended the law over a whole city, and repealed a section which exonerated from the operation of the lien, buildings erected by contract, on filing the written contract in the county clerk's office; and a second supplement repealed the repealing section of the first supplement. By this the exonerating section was revived, and extended, with the act, over the whole city.<sup>4</sup> Where a lien law is specially applicable to a county, and a general law is passed providing for liens, wherein no mention is made of the existing statute, it is not necessarily a repeal of the special law.<sup>5</sup> A lien law was enforceable by *scire facias*, and a subsequent repealing statute enacted that "until otherwise provided, it shall not affect proceedings upon *mandamus*, *quo warranto*, *scire facias* to repeal letters-patent, nor to any special statutory remedy not heretofore obtained by action or bill in equity;" it was held that the repealing act did not abolish the proceedings by *scire facias* to enforce a mechanics' lien.<sup>6</sup> But when a subsequent mechanics' lien law enacts new provisions of the same kind, having in view the same purposes as those contained in previous statutes, and a different mode of effecting them is prescribed, it is intended as a substitute for former enactments, and must operate as a repeal of them; as where a certificate is required to be recorded in the office of the clerk of the town, when a prior law required it to be

<sup>1</sup> Woodbury v. Grimes, 1 Colo. 100.

<sup>2</sup> [Collins v. Blake, 79 Me. 218.]

<sup>3</sup> Moore v. Mausert, 49 N. Y. 332.

<sup>4</sup> Flanigan v. Feuring, 2 Zab. (N. J.) 387.

<sup>5</sup> Spellman v. Shook, 11 Mo. 340.

<sup>6</sup> Doellner v. Rogers, 16 Mo. 340.

recorded in the registry of deeds.<sup>1</sup> So it would seem to follow that if certain provisions of an original statute be omitted from the amendatory statute, such provisions are abrogated, and cease to form any part of the statute. Thus, a provision in a former law requiring notice to be filed with a town clerk, being omitted in a subsequent act, is to be deemed abrogated.<sup>2</sup> A mechanics' lien law should be construed to be consistent with antecedent laws, but when this is impossible and the lien law is the later, it must prevail. For example, where a "wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join," and a subsequent lien law contemplates a lien on the lands of a married woman, the latter will prevail.<sup>3</sup> Again, where the lien law of 1875, for New York city, covered the whole subject, and saved and reserved all rights accruing under previous acts prior to July 1, 1875, it was deemed that it repealed by implication all previous laws on the same subject.<sup>4</sup> An act gave a lien upon buildings and wharves, and a subsequent act extended it, so as to include in its provisions bridges, ditches, etc., and a still later act repealed the first act, this by implication repealed the supplement, when the latter was so dependent upon the former as to become totally inoperative.<sup>5</sup> Of two lien laws which are repugnant to each other, the last should be regarded as repealing the first, and this is especially so, when the latter act contains a clause repealing all acts and parts of acts inconsistent with it.<sup>6</sup> But where a law is repealed by a new law containing all the essential parts of the law repealed, the repeal of the old law does not destroy existing rights thereunder.<sup>7</sup> And the qualifying clause of the last sentence is surplusage, for it makes no difference what the new law is or whether there is *any* new law. When a mechanics' lien is once fixed, repeal of the law does not destroy it.<sup>8</sup> The repeal of a lien law cannot operate on rights already acquired, but only on the mode of enforcing them.<sup>9</sup>

<sup>1</sup> *Weeks v. Walcott*, 15 Gray (Mass.), 54.

<sup>2</sup> *Moore v. Mausert*, 49 N. Y. 332.

<sup>3</sup> *Shilling v. Templeton*, 66 Ind. 586.

<sup>4</sup> *Heckman v. Pinkney*, 8 Daly (N. Y.), 466; s. c. 81 N. Y. 211; 6 Abb. N. Cas. 371; *Burbridge v. Marcy*, 54 How. Pr. (N. Y.) 446.

<sup>5</sup> *Ellison v. Jackson Water Co.*, 12 Cal. 542.

<sup>6</sup> *Purmort v. Tucker*, 2 Colo. 470.

<sup>7</sup> *Capron v. Strout*, 11 Nev. 304.

<sup>8</sup> [*Handel v. Elliott*, 60 Tex. 145, citing Phil. § 25. See § 29.]

<sup>9</sup> *Phillips v. M. O. Mason*, 7 Heisk. (Tenn.) 61.

## CHAPTER IV.

## LEGISLATIVE POWER OVER LIEN.

§ 26. **General Limits of Legislative Power.** — So far as the lien of the mechanic is a remedy created by law for the more effectual protection of the laboring class of citizens, the general rules relating to legislative power over remedies are applicable. The established doctrine is, that a State may regulate at pleasure the modes of proceeding in its courts, in relation to past as well as future contracts. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. A power must reside in every State, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided such alteration does not impair the obligation of the contract. If that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. There is no substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which takes away all remedy to enforce them, or encumbers it with



conditions that render it useless or impracticable to pursue it.<sup>1</sup> In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution. Annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation consists in its binding force on the party who makes it. This depends on the laws in existence when it is made: these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party, and of the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.<sup>2</sup> Nothing can be more material to the obligation of a contract than the means of its enforcement. Without the remedy, the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion. It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. If these doctrines were *res integræ*, the consistency and soundness of the reasoning which maintains a distinction between

<sup>1</sup> *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Livingstone v. Moore*, 7 Pet. 542.

<sup>2</sup> *McCracken v. Hayward*, 2 How. (U. S.) 608.

the contract and the remedy — or, to speak more accurately, between the remedy and other parts of the contract — might perhaps well be doubted. But they rest upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct.<sup>1</sup>

§ 27. **Legislative Acts which do not impair Obligation of Contracts.** — Subject to these general principles, and in accordance with them, a State may shorten the period of time within which claims shall be barred by the Statute of Limitations, or direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments.<sup>2</sup> It may abolish the right of distress for rent, or the lien of the landlord on property taken in execution, or the right of imprisoning a debtor. The validity of such laws has been fully recognized, even where they affected existing claims or judgments. They are deemed not to take away property, or impair the obligation of contracts, but simply to affect legal remedies. In like manner it has been held to be clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them; and to place real estate on the same footing as personal property, by confining the remedies of the creditor to the property held by the debtor at the time of the execution.<sup>3</sup>

§ 28. **Power to abolish Lien affirmed.** — Following this course of reasoning, many courts have held that the lien being, as we have seen, a mere incidental accompaniment to the contract created by statute,<sup>4</sup> — a preference which the mechanic may secure, if he proceed in a particular way, an advantage which, without the statute, he is in no wise entitled to;<sup>5</sup> and but a part of the remedy afforded for collecting the debt, — that a change of the remedy or its repeal is competent to the legislature, as it does not affect the obligation of the contract, on which the creditor may sue and recover judgment, as in ordinary cases, independently of the lien.<sup>6</sup> In a recent case,<sup>7</sup> as to the power of the

<sup>1</sup> *Van Hoffman v. City of Quincy*, 4 Wall. 535; affirmed in *White v. Hart*, 13 Wall. 646.

<sup>2</sup> *Bronson v. Kinzie*, 1 How. (U. S.) 315.

<sup>3</sup> *Watson v. N. Y. Cent. R. R. Co.*, 47 N. Y. 157; *Curry v. Landers*, 35 Ala. N. s. 280.

<sup>4</sup> *Frost v. Ilsley*, 54 Me. 345.

<sup>5</sup> *Bailey v. Mason*, 4 Minn. 546.

<sup>6</sup> *Bangor v. Goding*, 35 Me. 73; *Hall v. Bunte*, 20 Ind. 304; *Martin v. Hewitt*, 44 Ala. 418; *Pratt v. Seavey*, 41 Me. 370.

<sup>7</sup> *Woodbury v. Grimes*, 1 Col. 100.

legislature, it was said, where a mechanics' lien law was repealed, that it is noticeable that the repealed act did not establish contracts between parties, but gave a remedy upon contracts made without its aid. Its first words were: "Any person to whom a debt is due for labor performed, or materials furnished and actually used in the erection, etc., of any house," etc., shall have a lien. Now, a debt cannot be due except upon a contract, express or implied; and therefore the act assumes the existence of a contract, but does not create it. Furthermore, the common law gives an action to recover the value of labor and materials furnished; and therefore in every case of lien under the statute there was a perfect contract, and a common-law remedy to enforce it, independent of the statute. We are then authorized to say that the repealed act gave a new and additional remedy in a familiar class of cases. If we contrast this remedy with the pre-existing common-law remedy, we shall find that the debtor was equally bound to pay his creditor under both of them; in other words, the statute did not increase or diminish the obligation to pay previously resting upon the debtor. The statute enabled the creditor to appropriate the land upon which he labored and placed his materials, together with the structure which he erected, to the payment of his debt; but it did not add to the legal liability of the debtor arising from the contract to pay his creditor. Both before and after the passage of the act the common law gave to the creditor the right to resort to the property of the debtor for the purpose of satisfying his demand, so that in this respect the new remedy was not different from the old. But there was one, and but one, essential difference between the two remedies. Under the statute a lien upon the property benefited by the labor and materials of the creditor arose contemporaneously with the contract, preventing alienation by the debtor to the prejudice of the creditor, and giving to the creditor a preference over all other creditors of the debtor who should subsequently acquire liens upon that property; while, by the law as it existed before the statute, no such lien was established until judgment was obtained. Now, it is plain that the statute was important to the lien creditor only in case of a contest with the grantees or creditors of the debtor, and that it did not essentially change the relations between the debtor and creditor. The statute gave to the lien creditor a preference over the grantees and creditors of the debtor who had not at the date of the contract acquired a lien upon the property; but it did not subject the property of the debtor to the payment of the lien

creditor's demand in any degree or manner more advantageously to the creditor than the general law. The statute did no more than prescribe a rule of priority and preference among creditors and encumbrancers, which was different from that given by the general law. Now, we understand that legislative interference among the creditors and grantees of a debtor, which has the effect to postpone one for the benefit of another, is not prohibited by the constitution. It was said by the Supreme Court of the United States,<sup>1</sup> and afterwards repeated with approbation,<sup>2</sup> that it is within the undoubted power of State legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed void as against a subsequent purchaser, it is not a law impairing the obligation of contracts. This act stands upon the same principle. It postponed creditors and grantees of the debtor to the mechanic and material-man, but it did not touch the obligations of the contract. In a struggle between creditors and grantees it might be decisive of the contest, but it did not affect the relation of debtor and creditor; and as, after it was repealed, a substantial remedy against the debtor, according to the course of justice as it existed at the time the contract was made, was left to the mechanics, this was sufficient to satisfy the constitutional requirement.<sup>3</sup> In accord with these views, other courts had previously held that the legislature might repeal a statutory provision giving a lien upon property, and thus defeat the lien remedy which existed at the time the work was performed,<sup>4</sup> and this although at the time of the repeal the proceedings prescribed by the statute for enforcing the lien had been instituted, and were rightfully pending in court.<sup>5</sup> The matter of lien belongs to the remedy, and may at any time be modified or wholly taken away without the imputation of impairing the obligation of contracts.<sup>6</sup> A mechanics' lien is not a part of the contract — not a vested right — but an incident of the remedy, and may be taken away by the legislature at any time, provided some substantial remedy is left.<sup>7</sup> A limitation, however, is imposed by some tribunals on this general power of the legislature, in that the law

<sup>1</sup> Jackson v. Lamphire, 3 Pet. 290.

<sup>2</sup> McCracken v. Hayward, 2 How. 613.

<sup>3</sup> Woodbury v. Grimes, 1 Colo. 100.

<sup>4</sup> Donaldson v. O'Connor, 1 E. D. Smith, 695; Watson v. N. Y. Cent. R. R., 47 N. Y. 15.

<sup>5</sup> Bangor v. Goding, 35 Me. 73.

<sup>6</sup> [Best v. Baumgardner, 122 Pa. 17, 24 (dictum as to the "taking away").]

<sup>7</sup> [Hanes & Co. v. Wadey, 73 Mich. 178; Bourgette v. Williams, 73 Mich. 208, 215.]

must be repealed before the claimant has perfected proceedings to such an extent that rights in the property over which the lien is claimed have become vested.<sup>1</sup> In such case he must have fully perfected the proceedings before the repeal. The filing of the petition or claim for lien is not sufficient within the meaning of the rule.<sup>2</sup> The lien, it seems, must have ripened into a title to the land by a sale under the judicial proceedings authorized by statute, before the legislative authority is destroyed.<sup>3</sup>

§ 29. **Power denied.** — Several courts, while recognizing the general doctrine as above stated, have not admitted the right to be so unrestricted, and have held the legislature to possess no power to take away or impair the right to the security of the lien; that the performance of work under a statute which secures a lien gives a right, — namely, a right to file a lien of which the workman cannot be deprived.<sup>4</sup> In one case it was said, that whenever a mechanic's lien is created for material furnished, the right to the lien becomes a *vested* right at the time the material is so furnished, and it is not within the power of the legislature to destroy afterwards such right, by repealing the statute under which the right has accrued, or otherwise.<sup>5</sup> So where a laborer had a lien prior to all others by virtue of a statute, it was held that a subsequent statute, postponing his lien to that of others, was unconstitutional as impairing a vested right, and also as impairing the obligation of a contract.<sup>6</sup> For while it is conceded to be within the province of the legislature to alter the remedy for the enforcement of the right, it is denied to be constitutional to affect its validity or efficacy as created by existing laws, by authorizing any substituted security.<sup>7</sup> So that the repeal of the law after the lien has attached by performance of work does not defeat the lien.<sup>8</sup> The right to a lien vests at the time the service is rendered and the legislature cannot afterwards divest it. The legislature may alter the remedy, but cannot materially impair it in respect to liens already vested, for the remedy existing at the time of the contract is a material part of the lien. The remedy of a repealing statute will be applied to previously vested liens if such remedy is adequate, but if the former law is repealed, and no adequate remedy pro-

<sup>1</sup> Frost v. Ilsley, 54 Me. 345.

<sup>2</sup> Bailey v. Mason, 4 Minn. 546.

<sup>3</sup> Watson v. N. Y. Cent. R. R., 47 N. Y. 157.

<sup>4</sup> Christman v. Charleville, 36 Mo. 610.  
A governor or general, acting under martial law, may suspend, but cannot repeal,

the law on the subject of lien. Winter v. Dickerson, 42 Ala. N. S. 92.

<sup>5</sup> Weaver v. Sells, 10 Kan. 619.

<sup>6</sup> Warren v. Woodward, 70 N. C. 382.

<sup>7</sup> Hallahan v. Herbert, 11 Abb. Pr. N. S. 326.

<sup>8</sup> *In re Hope Mining Co.*, 1 Sawyer, 710.  
[See § 25.]

vided by the repealing law, the court will enforce vested liens according to the remedy of the repealed law.<sup>1</sup> Subject to this exception the rights of the parties are fixed by the law in force when the contract is made, but such rights are to be established and enforced by the law existing at the bringing of the suit.<sup>2</sup>

§ 30. **Power as to Future Contracts.**—As to future contracts, there is no doubt the legislature may make such regulations affecting the right of lien between the parties, and priorities of third persons, that shall be deemed advisable. Thus, an act may be passed to take effect in the future, subordinating even prior judgment and mortgage liens to subsequent mechanics' liens, but such liens as have accrued prior to the passage of the act cannot be thus affected.<sup>3</sup> Neither can the lien be extended so as to impair the obligation of contracts or liens of duly recorded encumbrances antecedent to the act.<sup>4</sup> If enacted by prior statute, mechanics' liens may be made liens on all the property possessed by the debtor.<sup>5</sup> On the other hand the legislature has the right to prefer any other lien over those of mechanics; and where it declares "a widow's lien shall be preferred, excepting those of vendors for purchase-money of real estate," the rule of *expressio unius exclusio alterius* prevails, and mechanics' liens will be subordinated to the widow's right.<sup>6</sup> Indeed, there is no provision of the Constitution which precludes the legislature from declaring a statutory lien, in respect to future contracts, in favor either of the contractor or the laborer, upon the land of the owner at whose instance and for whose benefit the services are performed. Every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection.<sup>7</sup>

§ 31. **Modification of Lien.**—Implied in the power of repeal is the right of modifying the remedy either in favor of the owner or mechanic. Thus where a law had been construed so as to enable a tenant for years to charge the fee-simple estate of the owner, a statute which so modified the remedy that no greater estate in the premises charged with the lien could be sold than

<sup>1</sup> [Goodbub v. Estate of Hornung, 127 Ind. 182, 191.]

<sup>2</sup> [Goodbub v. Estate of Hornung, 127 Ind. 182, 192, citing Phillips, § 24. See § 24.]

<sup>3</sup> Warren v. Woodward, 70 N. C. 382.

<sup>4</sup> Coe v. N. J. Midland R. Co., 31 N. J. Eq. 105.

<sup>5</sup> Stonewall Jackson Association v. McGruder, 43 Ga. 9.

<sup>6</sup> Hildebrand's Appeal, 39 Penn. 133.

<sup>7</sup> Blauvelt v. Woodworth, 31 N. Y. 285; Hicks v. Murray, 43 Cal. 515.

was vested in the person in possession at the time the building was erected, although it applied to liens created before its passage; in altering, modifying, or even taking away the remedy, it did not violate the provisions of the constitution which forbid the passage of *ex post facto* laws, or laws impairing the obligation of contracts.<sup>1</sup> So it is competent to provide a new remedy for the builder or mechanic who is already under a contract for work, and to limit it to cases where the work was yet to be performed.<sup>2</sup> To the same effect a lien law which applies its remedy to pre-existing contracts, so as not to alter the rights of the parties to the contract by impairing its obligation, is not unconstitutional, nor retroactive, although the remedy is changed by creating a lien on the building.<sup>3</sup> Again, after work had been done for which the laborer was entitled to a lien, and before the expiration of the time within which he might proceed to enforce it, it was held competent for the legislature to provide a new and more efficacious remedy.<sup>4</sup> So where a contract is made for the performance of labor on a canal, and, after most of the work had been completed, a law was passed giving a lien for work and labor done on canals, such an act is constitutional, though none existed at the date of the contract.<sup>5</sup> Likewise is a retrospective statute which touches not the right but remedy only; and a statute which declares that a previous law shall be so construed as to include mechanics' claims which have been filed is constitutional, as between the parties and volunteers. But such an act is unconstitutional when it seeks to give validity as a lien to a claim filed, which was no lien when a purchaser, for value actually paid, intervened before the enactment of the law.<sup>6</sup> The preceding doctrine has, however, been denied, and the contrary affirmed, that a statute cannot affect a contract so as to make a new contract for the parties entirely different in its character, as by making it a lien on land when it was none when the contract was made. The legislature may deal with remedies, but not with contracts, which parties have voluntarily made. Courts may relieve from their hardships, or enforce them; the legislature can do neither.<sup>7</sup>

§ 32. **Limitation of Right of Action to enforce Lien.** — Statutes of limitations pertaining to the remedy and not to the essence of

<sup>1</sup> *Evans v. Montgomery*, 4 W. & S. (Penn.) 218.

<sup>2</sup> *Hauptman v. Catlin*, 20 N. Y. 247.

<sup>3</sup> *s. c.* 3. *E. D. Smith*, 666; *s. c.* 4 *Abb. Pr. (N. Y.)* 472.

<sup>4</sup> *Paine v. Woodworth*, 15 Wis. 298.

<sup>5</sup> *Gordon v. South Fork Canal Co.*, 1 *McAllister (C. C.)*, 513.

<sup>6</sup> *Bolton v. Johns*, 5 Penn. 145; *Dunwell v. Bidwell*, 8 Minn. 34.

<sup>7</sup> *Kinney v. Sherman*, 28 Ill. 520.

the contract, enactments prescribing the time, provided they be not so unreasonable as to amount to a deprivation of the right within which a lien shall be enforced, are valid.<sup>1</sup> Accordingly, the legislature may shorten the time for filing the statement of the lien, but in such case they would be bound to give a reasonable time in which to file the statement, or their act would be void.<sup>2</sup> The legislature may extend the time as to existing contracts for bringing an action on the lien.<sup>3</sup> It has also been decided that, when authorized by statute, supplemental liens may be filed, though the right may have been lost by lapse of time.<sup>4</sup> In another case, however, where a lien had been lost by lapse of time or waiver, it was said that, to hold the legislature could revive and re-establish it by an act passed after the time had elapsed, within which it was required to be enforced, would be to allow them to act directly on existing rights of property; and was claimed to be a very different question from that which concedes to the legislature the right to alter or modify existing remedies.<sup>5</sup>

§ 33. **Legislative Interpretation of Lien Law.** — A legislative mandate to change the settled interpretation of a statute, and uproot titles depending on past adjudications, or a legislative direction to perform a judicial function in a particular way has been decided to be a direct violation of the constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action. A court cannot be bound by a mandate to decide a principle or a cause in a particular way. Such a mandate would be a usurpation of judicial power, and more intolerable in its exercise than a legislative writ of error, because the losing party would be concluded by it without being heard. But these principles are only applicable where rights have accrued upon expressed decisions. Until the judiciary has fixed the meaning of a doubtful law, the legislature has a right to explain it.<sup>6</sup> But an act which directs the courts to give a particular meaning to an act long on the statute books, and construed in a long line of cases, is void as an exercise of judicial power by the legislature.<sup>7</sup> The legislature may regulate future transactions in accordance with the meaning they place on the law, by means of a new law embodying and enacting the said

<sup>1</sup> *Griffin v. McKenzie*, 7 Ga. 163.

<sup>2</sup> *Weaver v. Sells*, 10 Kan. 619.

<sup>3</sup> *Edwards v. McCaddon*, 20 Iowa, 520.

<sup>4</sup> *Young v. Elliott*, 2 Phila. 352.

<sup>5</sup> *Steamboat Thompson v. Lewis*, 31 Ala. N. S. 497.

<sup>6</sup> *O'Connor v. Warner*, 4 W. & S. (Penn.) 223.

<sup>7</sup> [*Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. 627.]



meaning into a statute; but they cannot affect the past, — they cannot change the settled interpretation of a law under which rights have accrued.

§ 33 *a*. **Legislative Power to create Mechanics' Liens; Amount, Notice, etc.** — There is no constitutional objection to the creation by legislatures of statutory liens in favor of mechanics, under the ordinary circumstances and limitations specified in the statutes known as mechanics' lien laws.<sup>1</sup> Where the organic act of a Territory provided "that the legislative power of the Territory shall extend to all rightful subjects of legislation," etc., it was held that its legislature might pass a mechanics' lien law.<sup>2</sup> It is competent for the legislature to provide for a laborer's lien on logs, although the laborer does not retain possession of them.<sup>3</sup> It is constitutional to give a lien to sub-contractors against owners not personally liable.<sup>4</sup> A statute giving a sub-contractor a direct lien is not unconstitutional as forfeiting the owner's property to persons with whom he never contracted.<sup>5</sup> The owner contracts with reference to the law which gives the lien for work and labor furnished to his contractor by journeymen and others.<sup>6</sup> The provision of section 1 of said Act, allowing the "laborer, mechanic, or workman" thirty days "after the building is completed or the contract of such laborer, mechanic, or workman shall expire or he be discharged," in which to give the owner written notice that a lien is claimed for such labor and material as have been furnished the contractor, does not render the Act unconstitutional. The owner may, by contract or indemnity bond, protect himself against double payment for such labor and material.<sup>7</sup> This section (1) of said Act is not fairly susceptible of the construction that the owner may be held by laborers and material-men furnishing labor and material to the contractor for a greater sum than he agreed to pay the contractor. There is no express provision in the Act upon that subject. The former law had imposed the proper limitation upon the owner's liability.<sup>8</sup> There is no valid objection, upon constitutional ground, to sec. 2, ch. 103, Acts 1889, which, properly construed, authorizes every mechanic, laborer,

<sup>1</sup> *Glacius v. Black*, 67 N. Y. 563.

<sup>2</sup> *Alvord v. Hendrie*, 2 Montana, 115.

<sup>3</sup> *[Shaw v. Bradley*, 59 Mich. 199 ;  
*Reilly v. Stephenson*, 62 Mich. 589 ;  
*Craddock v. Dwight*, 85 id. 587, 590 ;  
*Federspiel v. Johnstone*, 87 id. 303, 307.  
(The owner is not liable to the laborer beyond the amount he agreed to pay the contractor for the work.)]

<sup>4</sup> *[Heath v. Solles*, 73 Wis. 217, 222.]

<sup>5</sup> *[Merrigan v. English*, 9 Mont. 113.]

<sup>6</sup> *[Cole M'fg Co. v. Falls*, 90 Tenn. 466.]

<sup>7</sup> *[Ibid.]*

<sup>8</sup> *[Cole M'fg Co. v. Falls*, 90 Tenn. 466, 467.]

and furnisher to take and remove, under the direction of a court, after giving ten days' notice to the owner of his purpose to do so, all "such property or the parts of the same on which his labor was performed, or materials, machinery, or other property was used," at the request of a contractor for the owner's benefit, when such improvements have been made upon the lands of a married woman, or other persons under disability, or upon trust estates, or upon lands held by other superior title or subject to prior liens, and the mechanic, laborer, or furnisher was ignorant of the state of the title and the true owner refuses to recognize the lien or claim for the materials furnished or labor performed.<sup>1</sup> Sec. 3, ch. 103, Acts 1889, permitting the owner who has been compelled to pay his contractor's employees in discharge of their lien on the property to take judgment over against the contractor upon his indemnity bond upon mere motion, is valid and constitutional. Although notice to the contractor of this motion is not expressly provided for in the Act it is required by necessary implication.<sup>2</sup> "The liability of the owner of a building which is being erected or repaired is not placed on the ground of a contract made with the owner by the person performing the labor or furnishing the material, because usually there is no such contract between them; and when there is, the right of the party to the lien is unquestioned, but upon the ground that as the labor or material contributed to the erection of the building is for the benefit of the owner, the law imposed upon him the responsibility, for at least sixty days, of seeing that the claims are paid. One object of the legislature was to prevent collusion between the owner and the contractor, and thus protect those who have furnished material or labor to the building from being defrauded."<sup>3</sup> A statute creating a lien for the reasonable value of labor and materials, irrespective of the fact that the owner may have paid the contractor in full, is not unconstitutional<sup>4</sup> as to future transactions.<sup>5</sup> The legislature cannot compel the owner to pay more than he contracted to on a valid contract, unless notified of the claims of sub-contractors before payment to the contractor. But the legislature can make recording necessary to the validity of the contract, and so make all payments invalid as against material-men, where the contract is not

<sup>1</sup> [Cole Mfg Co. v. Falls, 90 Tenn. 466.]

<sup>2</sup> [Cole Mfg Co. v. Falls, 90 Tenn. 466, 467.]

<sup>3</sup> [Foster v. Dohle, 17 Neb. 631; Marren v. Paxton, 17 Neb. 634; Colpetzer v. Trinity Church, 24 Neb. 113, 120.]

<sup>4</sup> [Henry v. Evans, 97 Mo. 47, 57, citing Davidson v. New Orleans, 96 U. S. 97; Sheppard v. Steele, 43 N. Y. 52; State v. Addington, 77 Mo. 110.]

<sup>5</sup> [Spokane Lumber, etc. Co. v. McChesney, 1 Wash. 609.]

properly recorded.<sup>1</sup> In Wisconsin it is held that a law giving sub-contractors a lien without regard to the *contract price* or sum due the contractor is valid. The property has been enhanced in value by the labor and materials.<sup>2</sup> The true rule on reason and authority undoubtedly is that a statute giving a lien to sub-contractors is constitutional, but it is limited to the amount of the original contract.<sup>3</sup> The consent of the owner is the basis of a lien.<sup>4</sup> His property can be taken only by his consent or default. A law which gives a mechanics' lien for labor or materials, regardless of the contract of the owner, so that his property may be taken to pay for service he never bargained for nor consented to, is unconstitutional. The Michigan law 270, of 1887, does this, and is therefore void.<sup>5</sup> An amendment making the owner liable for materials furnished after the passage of the law without regard to the state of his account with the contractor, is constitutional, though the contract for the materials was made before the law passed. Such a law does not impair the obligation of contracts.<sup>6</sup> In Minnesota, on the contrary, there can be no lien for work done after the lien law went into effect, but under a contract made before that event. It is beyond the power of the legislature to vary in this way the rights of the parties to the contract.<sup>7</sup> A law which allows a sub-contractor a lien on logs without providing for notice to and a hearing of the owner in the establishment of the debt, is unconstitutional.<sup>8</sup> A law providing for service by publication against defendants within the State and findable, is void, as not due process of law.<sup>9</sup> An Act of Assembly, giving the right to file a mechanic's lien in certain cases, which contains a proviso, that the act shall not apply to counties having a population of over two hundred thousand inhabitants, is unconstitutional and void, being in contravention of Article III., sec. 7, of the Constitution, which provides that "the General Assembly shall not pass any *local* or *special* law authorizing the creation, extension, or impairing of liens."<sup>10</sup> A lien statute providing for imprisonment for debt, giving a lien on homesteads, and enacting that any person performing

<sup>1</sup> [Kellogg v. Howes, 81 Cal. 170.]

<sup>2</sup> [Mallory v. La Crosse Abattoir Co., 80 Wis. 170, 175, Cassoday, J., dissenting.]

<sup>3</sup> [Bohn v. McCarthy, 29 Minn. 23; Laird v. Moonan, 32 id. 358. See § 62.]

<sup>4</sup> [O'Neil v. St. Olaf's School, 26 Minn. 329, 232.]

<sup>5</sup> [Spry Lumber Co. v. Trust Co., 77 Mich. 199, 201, 202; Snell v. Race, 78 Mich. 334; Keopke v. Dyer, 80 id. 311.]

<sup>6</sup> [Colpetzer v. Trinity Church, 24 Neb. 113, 123.]

<sup>7</sup> [O'Neil v. St. Olaf's School, 26 Minn. 329.]

<sup>8</sup> [Quimby v. Hazen, 54 Vt. 132, 140.]

<sup>9</sup> [Bardwell v. Collins, 44 Minn. 97; Arndt v. Griggs, 134 U. S. 316. See Brown v. Board of Levee Com'rs, 50 Miss. 468.]

<sup>10</sup> [Davis v. Clark, 106 Pa. 377.]

labor shall have a lien if not enjoined by the owner, absence of injunction by him being conclusive evidence of his consent, is in violation of the Minnesota Constitution in each of these respects.<sup>1</sup> Courts indulge every reasonable intendment favorable to the constitutionality of a statute passed with the required formalities. If susceptible of two constructions, one that renders the statute constitutional will be preferred to another, though more natural, that renders it unconstitutional. Statutes upon trial for unconstitutionality are entitled to the benefit of every reasonable doubt.<sup>2</sup>

§ 34. **Extra-territorial Liens.** — A statute of a State cannot create a lien on or appropriate any property beyond its jurisdiction, or provide any mode of proceeding which will give extra-territorial effect to such procedure.<sup>3</sup> As between its own citizens and upon property within its jurisdiction, a State has the authority to declare what claims or indebtedness shall be liens, and the force and effect of those liens.<sup>4</sup> A court of one State has no power to create a lien on the land of another State.<sup>5</sup> Accordingly it has been decided that a statute providing that "any person who shall hereafter perform any labor in building, etc., any house, upon lands, by virtue of any contract with the owner," etc., shall have a lien, can have no extra-territorial force. It was intended for the protection of those who performed labor or furnished materials within the State; therefore, where materials were purchased by, and delivered to the owner in the State of Connecticut, which were subsequently placed in his factory in New York, it was held that there was no lien.<sup>6</sup>

<sup>1</sup> [Meyer v. Berlandi, 39 Minn. 438, 441.]

<sup>4</sup> Scott's Case, 1 Abb. (U. S.) 336.

<sup>2</sup> [Cole M'fg Co. v. Falls, 90 Tenn. 466.]

<sup>5</sup> Boyce v. Grundy, 9 Pet. 275; Runk v. St. John, 29 Barb. (N. Y.) 585.

<sup>3</sup> De Witt v. Burnett, 3 Barb. (N. Y.) 89.

<sup>6</sup> Birmingham Iron F. v. Glen Cove Co., 78 N. Y. 30.

## CHAPTER V.

PERSONS ENTITLED TO LIEN.<sup>1</sup>

§ 35. **Lien dependent on Character of Work.**—Although it is declared in some adjudications that the mechanics' lien is given to secure an industrious and meritorious class, yet on examination it will be found that the privilege is conferred with reference more to the character of the work done than to the persons who perform it. Unless there is some specific designation of a class as peculiarly entitled to its provisions, the law will include in its privileges all citizens bestowing their labor or furnishing their materials, irrespective of their character as mechanics. Thus, where a law provided that every building should be subject "to the payment of the debts by reason of any work done or materials found and provided by any brickmaker, bricklayer, stone-cutter, etc., or any other person employed in furnishing materials for," etc., a man who had furnished bricks which he owned, though not a brickmaker, was entitled to the lien. The lien in this case having been given in general and comprehensive terms to every one, without distinction, "employed in furnishing materials," there was no reason why regular dealers in the article, or workmen bred to the particular craft, should have the exclusive benefit of it. There are mechanics who can turn their hand to anything; and there is the same reason for hypothecating the product of a bricklayer's labor for wages earned as a carpenter as there would be for wages earned in his proper vocation; and a dealer *pro hac vice* would seem to be as much within the reason of the law as if he had no other business.<sup>2</sup> Under a law which gave the lien "to the mechanic or undertaker who shall build or repair, either in whole or in part, a house, fixtures, or improvements, or who shall furnish materials in such building or repairing," although, in one case,<sup>3</sup> it was held that this lien did not exist in favor of a merchant furnishing materials, yet subsequently by the same court it was declared that it

<sup>1</sup> [See § 260 "Surety," and § 54 *et seq.* "Assignee."]

<sup>2</sup> *Savoy v. Jones*, 2 Rawle (Penn.), 343.

<sup>3</sup> *Greenwood v. Tennessee Man. Co.*, 2 Swan (Tenn.), 130.

would make no difference whether they were furnished by a merchant or mechanic; and that the merchant who purchased the materials from the manufacturer, and furnished them to the defendant, would be as much entitled to the lien as the manufacturer who furnished them directly to him, there being no good reason for any distinction.<sup>1</sup> So where "mechanics shall have liens upon the property of their employers for labor performed and for materials furnished," and a party bought a range, chandeliers, etc., to put them on the owner's premises, it was held if the plaintiff, as a mechanic, entered into a contract to furnish the above articles, and as such furnished them, and did the labor to put them in position, that he was entitled to a lien for the same as a mechanic, and did not sustain the relation simply of a vendor.<sup>2</sup>

§ 36. **Must come within the Class provided by Law.** — The class of persons entitled to the lien-remedy depends primarily, as in other matters relating to this subject, upon the provisions of the particular statute creating the lien. The party seeking to avail himself of its privileges must clearly show that he is of the class protected by its terms.<sup>3</sup> There is no equity in the labor he has performed, or materials he has contributed to the improvement of the estate, that will enable the courts to extend to a party the benefits conferred upon those less meritorious. With these considerations they have no concern. It is a matter exclusively for the legislative will to determine who shall possess the right to enforce the lien. And although it has sometimes been the case that unwise legislation has included those who should not, and omitted others who should, have been protected, yet it has been declared to be the duty of the judiciary to administer the law as they find it, trusting to subsequent enactments to remedy the injustice. Fortunately, the system is gradually assuming perfection; and all those who are most entitled to the exercise of its beneficial provisions, compatible with the ownership of property and the paramount rights of the public, have been generally included within its principles. Each State has so guarded the remedy as to prevent, in a greater or less degree, the evils that would necessarily attend the indiscriminate multiplication of liens on real estate. The contractor seems to be universally secured by the lien. In most of the States, the sub-contractor and material-man have either a lien

<sup>1</sup> E. T. Iron Man. Co. v. Bynum, 3 Sneed (Tenn.), 268.

<sup>2</sup> Collini v. Nicholson, 51 Ga. 561.

<sup>3</sup> Dano v. M. O. & R. R. Co., 27 Ark. 567.

given them directly on the land and building to secure them whatever may be due for their work and materials, or, as in the majority of laws, a right to notify the owner of their unpaid claim for work or materials, with a right of lien against the property for any unpaid balance which at the service of the notice may be in his hands and due to the contractor, or else simply a right of action, without the lien, against the owner for such unpaid balance. These same provisions are extended in some States to the workman, but generally the day laborer or journeyman has no such privilege; yet the more recent legislation tends to securing his claim.<sup>1</sup>

§ 37. **Non-residents, etc.** — Unless there is some express legislative authority, the mechanics' lien laws extend to non-residents as well as residents.<sup>2</sup> Indeed it may well be doubted, if a statute should make distinction between them, whether it would not be in conflict with the Constitution of the United States, which declares, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." These words are of very comprehensive meaning, and protect the right of a citizen of one State, among other things, to acquire personal property, to take and hold real estate, and to maintain actions in the courts of another State, without discrimination.<sup>3</sup> A recent case in Georgia, says that a resident of another State furnishing materials in Georgia is entitled to the same remedies as a citizen of Georgia, and that this is "settled by the Constitution of the United States."<sup>4</sup> A distinction, however, has been drawn between contracts and citizens, it being held to be constitutional to discriminate between the former; as where a law gave to partners *inter se* peculiar rights, provided they should reside within the State, and carry on the partnership trade there. So where certain privileges attached upon a marriage contract to be performed within the State.<sup>5</sup> In the absence, however, of discriminating legislation, it is no objection to the enforcement of the lien, that the contract was originally made to be performed out of a State, if it be afterwards changed by its being performed in the State by delivery of the materials therein.<sup>6</sup>

§ 38. **Minors, Females Covert, etc.** — No special reference is usually made, in the lien laws, to the legal status of the indi-

<sup>1</sup> [See § 52 *a.*]

<sup>2</sup> *Greenwood v. Tennessee Man. Co.*, 2 Swan (Tenn.), 130; *Atkins v. Little*, 17 Minn. 353.

<sup>3</sup> *Ward v. Maryland*, 12 Wall. 418.

<sup>4</sup> [*Thurman v. Kyle*, 71 Ga. 623, 630.]

<sup>5</sup> *Conner v. Elliott*, 18 How. (U. S.) 594.

<sup>6</sup> *Atkins v. Little*, 17 Minn. 353.

viduals to be protected by the remedy, — whether *minors*, *femes covert*, or those acting in a fiduciary character. The only limitation to the right would seem to arise by implication out of the fact that, as the lien is essentially dependent upon the existence of contract, all parties to it must be capable of contracting. But, as the disability of a minor is a personal privilege, his minority will avail little as a defence to his lien where a party has received his services or materials.<sup>1</sup> So, if articles furnished by a married woman are a part of her separate property, she may, when allowed by the local law, sue in her own name or by her next friend; or, if they be the property of the husband, he may avail himself of the lien. The rules of law applicable to their rights in general will obtain in the enforcement of the lien in their behalf.

§ 39. **Owner not entitled to Lien on his own Building.** — A law which provides that "every dwelling shall be subject to the payment of the debts contracted for any work," etc., does not allow an owner to enforce a claim against his own building, to the prejudice of third persons. Even when he is a member of a voluntary association which makes the improvement, he is postponed until the payment of others not belonging to the organization. The members of a voluntary association not incorporated are considered as partners in their relations to third persons; and the property of the association must be appropriated to pay the debts of creditors not members of the association, before it can be applied to the payment of the claims of those who are members; and a mechanics' lien filed by a member of such an association against a building erected by it is not available as against the liens of others not members. It is possible that persons owning lots of ground, and erecting buildings on them, to which they furnish work and materials, may file liens and maintain them among themselves, on the ground that they are *in equali jure*, and to be considered as mutually waiving objections. But that a person can enforce a lien on his own building, at the expense of third persons who hold similar liens on it for debts contracted by the former to the latter, is not reconcilable with law or equity. At law the lien of the owner would merge in the property, since no man can be both debtor and creditor; and equity would not uphold it, in order to place in the hands of the owner himself a portion of that fund, which ought to go to his creditor, whose debt was contracted on the faith of that fund.

<sup>1</sup> Van Bramer v. Cooper, 2 Johns. Barb. (N. Y.) 160; Whitmarsh v. Hall, (N. Y.) 279; Gates v. Davenport, 29 3 Den. (N. Y.) 375.



In such a case, however, where the work was done for an association by one of its members, there is no reason why he should not be paid from any surplus after satisfying those who were not members.<sup>1</sup> In a subsequent case, where an owner did work upon his own building, and a judgment was recovered against him, and subsequently thereto he employed others to complete what he had begun, under a statute which preferred the mechanics' lien "to every other lien which attached subsequently to the commencement of such building," the mechanics endeavored to avail themselves of the work of the owner to give their own a relation to the commencement of the building by him, and thus obtain priority over the judgment. It was held that, as to what was done by the owner, he obtained no lien by it, nor could he acquire any lien by any work he could do. His work is not within the law; and, if his work could create no lien in his own favor, it is not easy to see how it could, by relation, carry back the lien of other workmen, so as to overreach and cut out the judgment creditor of the owner.<sup>2</sup> So if a husband, at his own instance, expend money which is common property in building a house on land the separate property of his wife, he has no lien on the house or lot therefor, nor have his creditors after his decease.<sup>3</sup> The person claiming a lien must have contracted directly or indirectly with the owner. The person owning the property at the time of the improvements cannot claim a mechanics' lien for them against one to whom he afterward sells the property.<sup>4</sup>

§ 40. **Contractor.** — The party most generally secured is the contractor. The primary meaning of the word "contractor" is one who contracts, one of the parties to a bargain. He who agrees to do anything for another is a contractor.<sup>5</sup> This general term, however, as will be seen, has been held to include either those who have made contracts directly with the owner of the premises, or those who have contracted with a contractor. In this treatise it will be understood to comprehend only the former, the other being designated by the term "sub-contractor." The words "owner" and "contractor" denote two persons. The contractor is he who makes a contract with the owner;<sup>6</sup> the latter, as generally

<sup>1</sup> *Babb v. Reed*, 5 Rawle (Penn.), 151.

<sup>2</sup> *Stevenson v. Stonehill*, 5 Whart. (Penn.) 301.

<sup>3</sup> *Peck v. Brummagin*, 31 Cal. 440.

<sup>4</sup> [*Littleton Sav. Bk. v. Osceola Land Co.*, 76 Iowa, 660.]

<sup>5</sup> *Kent v. N. Y. Cent. R. R. Co.*, 12 N. Y. 628.

<sup>6</sup> *Simpson v. Dalrymple*, 11 Cush. (Mass.) 308.

used in the mechanics' lien law, is the correlative of contractor, and means the person who employs the contractor, and for whom the work is done under the contract. A party furnishing material to a railroad company under a contract with its president is an "original contractor."<sup>1</sup> One who agrees with the owner to paint a building is an original contractor.<sup>2</sup> If A. contracts to furnish so much labor at a certain price per man, the liability being to A. for the said price, A. has a lien, but if A. merely acts as an employment agency, and the liability of the owner is direct to the workmen, the latter only have a lien and not A.<sup>3</sup> A lien was granted only to an "original contractor;" the record showed that the original contractor after doing part of the work abandoned the further construction of the building; the original contractor then transferred the contract to the plaintiff, the defendant expressly agreeing "to deal in the future with the plaintiff as if he were the original contractor:" held that defendant was estopped from denying plaintiff was an original contractor, and as such entitled to the lien, to be enforced in his own name, although he had agreed to pay over to the original contractor a specified part of the profits he might realize under the contract.<sup>4</sup> One who builds a store on A's land under agreement with A. is both contractor and mechanic, and in either capacity has a lien.<sup>5</sup> A material-man is an original contractor, if he furnish the materials on a contract with the owner.<sup>6</sup> Where C. refuses to give credit to the contractor and the owner promises to pay for the materials, but the bills were made in the contractor's name so that he could check the lumber as it came, the plaintiff was allowed a lien as an original contractor.<sup>7</sup> Where Cook contracts with M. to repair M.'s house, and agrees with Carney for materials, and after part of them are furnished M. tells Carney that he will pay for them, Carney may claim a lien as a contractor directly with the owner both for the materials furnished before and after M.'s promise.<sup>8</sup> As a general rule the construction of the words "owner," "contractor," &c. is to be governed by the whole context of the particular statute under interpretation; thus, where "every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, must within thirty days," etc., file his claim, it was held

<sup>1</sup> *Hearne v. Chillicothe*, 53 Mo. 324.

<sup>2</sup> [*Baird v. Peall*, 92 Cal. 235.]

<sup>3</sup> [*Malone v. Big Flat M. Co.*, 76 Cal. 578.]

<sup>4</sup> [*Pensacola Railroad Co. v. Schaffer*, 76 Ala. 233.]

<sup>5</sup> [*Thurman v. Pettitt*, 72 Ga. 38.]

<sup>6</sup> [*Ambrose Manufacturing Co. v. Gampen*, 22 Mo. App. 397.]

<sup>7</sup> [*Wisconsin Planing Mill Co. v. Grams*, 72 Wis. 275.]

<sup>8</sup> [*Carney Bros. v. Cook*, 80 Ia. 747.]

that material-men furnishing materials for the construction of a building under a contract with the owner, and persons directly employed by him to work on the building, were not "original contractors."<sup>1</sup> Where parties enter into a building contract, though it may stipulate for the purchase of the premises by the contractor, it does not prevent the relation of owner and contractor from being established.<sup>2</sup> On the other hand, it was held that, when an owner of land agrees to sell it to another, and advances him money with which to build upon the premises sold, and, after completion of the houses, the builder is to secure the purchase-price and the advances by mortgage, the relation of owner and contractor does not subsist as between the parties. In such cases the person who agrees to purchase builds by permission of the owner, and the property is chargeable with the lien until the deed is actually delivered, without regard to the terms of the contract of purchase.<sup>3</sup> The relation of owner and contractor cannot be inferred against an express agreement, although the owner witnesses the progress of a building, and advances money to the builder.<sup>4</sup> Whenever the lien is given to those who contract with an owner or his agent, the law covers the case of a contractor performing labor or furnishing materials; as where an act provides that "any person who, by virtue of any contract with the owner," shall perform any labor or furnish any materials, may acquire a lien. So when the phraseology of the statute is "any person performing labor or furnishing materials on a contract with the proprietor" may have the lien, the contractor is universally held to be entitled to this remedy.<sup>5</sup> Again, the term "general contractor" in a lien law, where the same person is subsequently designated as "contractor," includes all persons furnishing materials for or doing work, under a contract made by such persons directly with the owner of the building.<sup>6</sup> If the act provide "whenever any building, turnpike, railroad, etc., shall be constructed by contract with or at the request of the owner thereof, etc., such building, etc., shall stand pledged for all work done in the construction, which shall have been furnished by any person who has contracted or been requested to

<sup>1</sup> Sparks v. Butte Co. Grav. Co., 55 Cal. 389. [Schwartz v. Knight, 74 Cal. 432.]

<sup>2</sup> McDermott v. Palmer, 11 Barb. (N. Y.) 9.

<sup>3</sup> Gates v. Whitcomb, 11 Supreme Ct. (N. Y.) 137.

<sup>4</sup> Walker v. Paine, 2 E. D. Smith (N. Y.), 662. The lien does not extend

to materials and labor procured by a contractor as the agent of the owner, and in his name and on his credit, although the contractor may have paid for them out of his own funds. Kerby v. Daly, 45 N. Y. 84.

<sup>5</sup> Shotwell v. Kilgore, 26 Miss. 125.

<sup>6</sup> Merch. & Mech. Saving Bank v. Dashiell, 25 Gratt. (Va.) 616.

construct," etc., the contractor is entitled to a lien upon the estate for not only his own personal labor, but for the labor of all employed by him in such construction. The legislature must have contemplated, and the above act evidently does contemplate, a contract for the erection and entire construction of buildings, turnpikes, etc. To do the entire labor would be impossible and beyond the strength of a single individual, and, if it were possible, could not be accomplished in any reasonable time. He must necessarily furnish labor in addition to his own work, to render his own of an essential service to his employer. A contract to erect and complete a dwelling-house would require the labor of many different persons, of different mechanical pursuits, — the housewright, the painter, mason, etc. The contractor would not combine all these, yet he is employed to do the work of all and each of them. Neither does it furnish any argument against this view of the provisions of the act that a lien is given to the journeymen or other laborers employed by the original contractor. This is a right entirely subordinate to that of the contractor. They do not contract with the owner of the estate, and acquire no right of action at common law against him, but only against their immediate employer. The contractor has his election to bring his action at law or proceed by petition to enforce the lien. They have no such election as to the owner of the estate. They may, however, decline trusting entirely to the solvency of their employer, and look to the estate. But in that case they proceed against the estate only, and not against the owner. The effect of such a proceeding on their part would be to diminish the lien of the contractor *pro tanto*. Neither is it material whether all the labor is performed upon the estate or in the workshop or elsewhere, if it finally goes into the work contracted for. The labor, wherever done, equally becomes a part of the repairs and improvements made upon the estate. The labor upon the material before it is annexed becomes part of the labor of improvement when annexed. The question in such case is, Did the contractor procure the labor for which he charges in his account at his own expense, and in the prosecution of the work contracted for, and, if he did, he has a lien to secure its payment. Such an act not only secures the contractor for the labor he has procured, but also for all materials used by him in the construction.<sup>1</sup> The constitutional provision for giving to mechanics and laborers liens for their work, and

<sup>1</sup> Sweet et al. v. James, 2 R. I. 270; Singerly v. Doerr, 62 Penn. 9.

the statutes enacted in pursuance thereof, and also giving liens for materials furnished, extend to and embrace contractors who do not themselves perform the labor, or furnish the materials used, but procure it to be done through the agency of others. . . . The statute gives the lien "for the payment of all debts contracted for work done on the same or material furnished."<sup>1</sup>

§ 41. **When Contractor not entitled.** — But where Congress had passed a law that every building "shall be subject to the payment of the debts contracted for, or by reason of any work done," etc., by any brickmaker, bricklayer, carpenter, painter, lumber-merchant, etc., or any other person employed in furnishing materials, etc., it was held that a master-builder, undertaker, or contractor, who undertakes, by contract with the owner, to erect a building or some part or portion thereof, on certain terms, does not come within the letter or spirit of the act, or within any of the classes enumerated as entitled to this special remedy. Such persons are said to have an opportunity, and are capable of obtaining their own securities. They do not labor as mechanics, but superintend work done by others. They are not tradesmen in lumber or other materials for buildings, but employ others to furnish materials. If such contractor should by accident be a carpenter, or an owner or vendor of lumber, yet he deals not with the owner in this capacity, but as an undertaker, who has covenanted for his own securities. The court further say the title of this act shows its policy and intention. It is to secure, to "mechanics, and others, payment for labor done and materials found;" and the persons enumerated are plainly those mechanics and tradesmen whose personal labor or property has been incorporated into the building, and not the agents, supervisors, undertakers, or contractors who employed them. The contractor, not being enumerated among those entitled, cannot claim its benefits. The aim and policy of the act is also obvious. Experience had shown that mechanics and tradesmen who furnish labor and materials for the construction of buildings are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation; and, after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings, or encumbers them with liens; and thus one portion of his creditors is paid at the expense of the labor and property of others. Or the solvent owner, who builds by the agency of a contractor or middle-man,

<sup>1</sup> [Lester v. Houston, 101 N. C. 605, 609.]

pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is, not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him if the owner were not compelled thus to take care of their interests before he pays away the price stipulated. But the contractor is neither within the letter nor the spirit of such an act.<sup>1</sup> A contractor who hires his license to another contractor in order that the latter may complete his contract, has no lien on the premises for the rent price of his license.<sup>2</sup>

§ 42. *Same.* — The foregoing decision cited with approval the two following, which interpreted identical phraseology; in the earlier of which it was said that were the contractor, as well as the mechanic or material-man, allowed to file a lien, there might be double liens and possibly double recoveries, which the law does not tolerate. By reason of the novelty of the subject it happened that the first act fell short of the object in omitting to secure those who, bargaining with a middle-man, had not an opportunity to secure themselves, in consequence of which it was displaced by a subsequent act, which provided for those who directly furnished materials and labor, and not for the middle-man, who took his own security and furnished nothing but his superintendence and skill as an undertaker. The contractors, therefore, had no right to file for anything pursuant to their contract as undertakers; though they might have done so for any additional work or materials directly furnished by themselves.<sup>3</sup> Again, it was held that the point was not new. One who furnishes nothing but his superintendence and skill as an undertaker has no right to file a lien for anything in pursuance of his contract as such. The contractor agreed to furnish all the materials and erect the buildings for a fixed price, and it is to such a state of things that these remarks are intended to apply. Can, said the court, an individual stand in the double character of contractor and material-man? There is no good reason why he should. If he is entitled to file a lien, it must be when the contract is made; for it is very plain that nothing he can do after-

<sup>1</sup> *Winder v. Caldwell*, 14 How. (U. S.) 434.

<sup>2</sup> [*Burnside v. O'Hara*, 35 Ill. App. 150.]

<sup>3</sup> *Jones v. Shawan*, 4 Watts & S. (Penn.) 257.

wards can alter his position, nor can he, under the pretext that he furnished the materials as well as superintended the work, burden the property with a double lien. What is it to the owner, in what way he procures the materials or finds the labor, whether it be by purchase or out of his own stores, whether by his own labor or the labor of others whom he hires for that purpose? The owner has a right to take it for granted, when there is no stipulation to the contrary, that the contractor is satisfied with the security for the faithful performance of the contract; for when the bargain is made, or before he commences the work, it is the proper time to exact real or personal security if he require it, or to depend, as he may in many cases, with confidence on the known ability and integrity of the owner. As the case does not come within the mischief, it should not be extended by construction; for, without being additionally burdened, owners desirous of improving their estates are already exposed to great risks, which can only be avoided, if at all, by extreme care and caution.<sup>1</sup> And subsequently to the same effect. If ever human statute disclosed an intention not to be mistaken, the above shows that the contractor whom it ordered to stand as a respondent should not in any case assume the attitude of a demandant. And there was cogent reason why he should not; for, unlike those who dealt with him as a middleman, he had an opportunity to secure himself by his contract with his employer, and, if he omitted to embrace it, the fault was his own. It was the frequency of loss sustained by mechanics and dealers, in consequence of the employment of this kind of agent, which first induced the legislature to give them a lien on the building; for if the owner of the ground had continued to be his own master-builder, as he was in the primitive days of the province, those who dealt with him would have had no juster claim to such a lien than the ploughman of another's field would have to a lien on the crop. If to the legitimate liens the contractor had been allowed to add a particular lien of his own, there would have been a scuffle between him and the furnisher of the labor or material for the pay, in which the court would have been employed to determine, not whether the article had been furnished on the credit of the building, but whether the contractor had made it his own by having paid for it; and that would have involved a variety of matters of account, set-offs, and dealings between him and his competitors.<sup>2</sup>

<sup>1</sup> *Hoatz v. Patterson*, 5 Watts & S. (Penn.) 538.      <sup>2</sup> *Bolton v. Johns*, 5 Penn. 145.

The foregoing decisions have been given to show the construction of the particular phraseology employed. It was found necessary both by Congress and the legislature of Pennsylvania to amend their legislation. The former did so, by passing an act taking away the lien from the laborer and material-man, and extending it to the contractor;<sup>1</sup> the latter, by including the contractor in the same provisions as the others.<sup>2</sup> In a somewhat similar case, where the law gives "all mechanics of every sort" a lien, the complaint was held defective which described the parties seeking to enforce the lien as "partners and contractors." But such error may, when the statute allows, be amended. Contractors are not *per se* mechanics. They may be, however, and when such a complaint is amended and declared upon as "mechanics'," parol evidence is admissible to show that the contract was made with them in their character of mechanics, and not as contractors. This is always a question for the jury.<sup>3</sup>

§ 43. **Not dependent on Payment of Workmen, etc.** — When a lien is given to those only whose debts accrued on a contract made with the owner, a person who does the work agreeably to his contract with the owner has a lien, whether he has paid the workmen who assisted him or not.<sup>4</sup> The lien is not lost by contractors in consequence of a dissolution of their co-partnership, as it is competent, after the dissolution, for the parties to carry out a contract previously made and in part performed. To that extent the partnership would be considered in law as still existing.<sup>5</sup> Nor is the lien to be lost by reason of the death of the contractor.<sup>6</sup> A party also may avail himself of the lien, though he stipulates against its being filed by "any other person or sub-contractor."<sup>7</sup>

§ 43 *a.* **Surety.** — One who is surety for the contractor on his bond to pay for all materials, cannot claim a lien for materials furnished by him at the request of the contractor. That would enable a man to exact payment for what he had promised should be paid for by another.<sup>8</sup>

§ 44. **Sub-contractor.**<sup>9</sup> — A sub-contractor is one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its per-

<sup>1</sup> Act of Congress, Feb. 2, 1859; 11 Stat. at Large, 376.

<sup>2</sup> Act of June 16, 1836.

<sup>3</sup> Savannah Co. v. Grant, 56 Ga. 68; [see § 40]; Savannah v. Callahan, 49 Ga. 506.

<sup>4</sup> Southwick v. Packet Boat Clyde, 6 Blackf. (Ind.) 148.

<sup>5</sup> Holmes v. Shands, 26 Miss. 639.

<sup>6</sup> Telfer v. Kiersted, 9 Abb. Pr. (N. Y.) 418.

<sup>7</sup> Young v. Lyman, 9 Penn. 449.

<sup>8</sup> [McHenry v. Knickerbacker, 128 Ind. 77, 78. Compare Ruggles v. Blank, 15 Bradw. 436.]

<sup>9</sup> [See § 301, Partners.]



formance. Where there is no contract between the principal parties there can be no sub-contractor.<sup>1</sup> The term "contractor," however, when used in a statute, may either include or exclude a sub-contractor in its signification, according as its context may demand. For example, where a law provided that "as often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer, such laborer may give notice of such indebtedness to said company, and said company shall thereupon become liable to pay such laborer," though the primary meaning of the word "contractor" signifies one who contracts, this statute does not restrict the term "contractor" to one who makes the contract with the railroad; nor is there anything in its context which thus limits the term. A party may not have entered into a contract with the company; still, if he has entered into such contract with any one, he is a contractor. The statute does not use the term "sub-contractor," which is sometimes used, though the word is not to be found in Webster's Dictionary. Considering the whole section, and in view of the entire statute, it is clear that the legislature intended to make provision for the payment of all laborers who should perform work in constructing the road for any contractor, whether such contractor entered into a contract immediately with the company or with one who had thus contracted with the company. The statute is remedial, and was designed within safe limits to enable the laborer who had not been paid by his immediate employer to resort to the railroad company; and the term "contractor" therefore includes a sub-contractor.<sup>2</sup> Under a similar statute in Missouri the same construction was given.<sup>3</sup>

But if it appear from the context of the law that the term "contractor" is used in a more limited sense, a sub-contractor will be excluded. Thus, a statute whereby it is enacted that "any person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting or repairing any building, shall have a lien upon the land for the amount due to him for such labor or materials," creates a lien in favor only of persons performing labor or providing materials at the instance of the owner of the property. Its benefits are not extended to those rendering services or furnishing materials on account of the contractor.<sup>4</sup> It may be stated, that when both contractor and

<sup>1</sup> *McGinniss v. Purrington*, 43 Conn. 143.

<sup>2</sup> *Kent v. N. Y. Cent. R. R. Co.*, 12 N. Y. 628.

<sup>3</sup> *Peters v. St. Louis & Iron Mt. R. R.*, 24 Mo. 586.

<sup>4</sup> *Dawson v. Harrington*, 12 Ill. 300.

sub-contractor are mentioned, and the statute draws no distinction between them, the same construction applies to each.<sup>1</sup> If a railroad company A. sells to company B. the unfinished road, contracting with B. to finish it, and then employs workmen, the latter are sub-contractors, and have no lien unless they comply with the provisions pertaining to sub-contractors.<sup>2</sup> One who sells materials to the dealer who has contracted to supply the contractor, is not a "sub-contractor" within the meaning of the Minnesota statute, and has no lien.<sup>3</sup>

§ 45. **Lien of Sub-contractor must be provided by Law.** — But few presumptions are made in favor of sub-contractors, and they must invariably show that they come within the plain words of the law. When they do not, they will be excluded from its benefits. Thus, where all the previous statutes of a State contemplated a lien only in favor of an original contractor, with the right to a sub-contractor to give notice to the owner of his claim, and then bring a personal action against the owner for the unpaid balance, it was held that a law providing that "any person or firm, artisan, or mechanic, who may labor or furnish materials to erect any house, shall have a lien," etc., did not extend the lien to sub-contractors on the ground that the provisions of the law ought to be positive and express to authorize an unlimited lien on an owner's property, where there was no privity of contract, and irrespective of the amount of the original contract.<sup>4</sup> So section 1381 of the Mississippi Code of 1880, providing that material-men and laborers may by notice to the owner bind money in his hands due the contractor, does not cover a sub-contractor who hires laborers, and does part of the work under contract with the contractor.<sup>5</sup> Again, where an act provided that "when any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work," etc., its plain design is to exempt buildings erected by contract from the encumbrance of all liens, except those of the contractor himself.<sup>6</sup> Where, in order to create a lien, the debt must be due, "by virtue of an agreement with, or by consent of the owner of such building, or by virtue of an agreement with, or by consent of some person having authority from, or rightfully acting for, such owner in procuring such labor," and a contractor undertakes to

<sup>1</sup> *Donnelly v. Libby*, 1 Sweeney (N. Y.), 259.

<sup>2</sup> [*Templin v. Chicago, &c. R. Co.*, 73 Iowa, 548.]

<sup>3</sup> [*Merriman v. Jones*, 43 Minn. 29.]

<sup>4</sup> *Shields v. Morrow*, 51 Tex. 393.

<sup>5</sup> [*Rivers v. Mulholland*, 62 Miss. 766.]

<sup>6</sup> *Ayres v. Revere*, 1 Dutch. (N. J.) 471.

build a house and to furnish all labor at his own cost, a mechanic employed by him without the owner's consent has, for his labor, no lien on the building erected.<sup>1</sup> So, if the lien law enact that there shall be "a lien for the payment of what may be due from the proprietor," although this language is very comprehensive, and, literally read, is perhaps sufficient to embrace the claims of sub-contractors; yet it was declared that it should have a reasonable construction, and, as there was no privity between a sub-contractor and the proprietor, no liability existed on his part to pay the contractor's debts unless it was created by statute. This statute gave a lien for what might be due to any person from the proprietor. But, unless it was the object of the statute to transfer the contractor's debt to the sub-contractor, there was nothing due from the proprietor to the sub-contractor, and, of course, nothing on which to found a lien; and it therefore did not extend to sub-contractors.<sup>2</sup> To the same effect, when the law is that the labor must be furnished "by virtue of a contract or agreement with the owner or agent thereof," a lien can only arise in favor of the original contractor, or those who may stand in his place under the contract.<sup>3</sup> Again, "every master mechanic, artificer, etc., who shall erect any building, shall have a lien for the amount due, provided a memorandum in writing, in the nature of a contract, be signed by the parties to such contract and the proprietor of the premises, or some other person lawfully authorized in writing by them," such law applies only to building contracts directly with the proprietor of the premises, and does not apply to a sub-contract with the immediate contractor, though guaranteed by the owner of the premises; the court observing that a party should not be construed to give a specific lien when none is created by his own deed, unless it exists by usages of trade or the express provisions of law.<sup>4</sup> And although some expressions in a statute are so broad as in themselves to favor the idea that the legislature intended to give the right of lien to any one who performed work upon the building, by whomsoever employed, yet when the remedy would be impracticable and unjust, these circumstances will control, and the lien will be considered as given only to those who contract with the owner of the building, or have a claim against him for their labor, and not to workmen employed

<sup>1</sup> *Murray v. Earle*, 13 S. C. (Shand) 87.

<sup>2</sup> *Consociated Pres. Soc. v. Staples*, 23 Conn. 544.

<sup>3</sup> *Toledo Novelty Works v. Bernheimer*, 8 Minn. 118.

<sup>4</sup> *Kelley v. Bank of South Carolina*. 1 McMull. Ch. 431.

by contractors, and between whom and the owner there is no privity of contract. So, when a school district was summoned as the trustee of one who had built their school-house, and to whom they were indebted therefor, workmen, who had been employed by such contractor upon the building, and who had filed their claims against him in the town-clerk's office, obtained judgment thereon, and caused the same to be recorded, all in conformity with the laws regulating mechanics' liens, did not thereby gain any lien upon the building, or claim to the money due from the district to the contractor; and they could not, by entering as claimants in the trustee suit, defeat the attachment of the indebtedness of the district to the contractor by a creditor of the latter.<sup>1</sup> This matter, however, rests with the legislature of each State; and where a statute gives the sub-contractor an absolute lien against the owner until sixty days after work done, except only the amount shall not exceed the original contract, the sub-contractor is not bound by the other terms of the contract between owner and contractor.<sup>2</sup> So, if a law gives "any person who shall perform any labor, and any person who shall furnish any materials in erecting," etc., "a lien for the value of such labor, etc., upon such house, etc., and upon the lot upon which the same shall stand, to the extent of the right, title, and interest of the owner of the property," it gives the lien to every person who does work, without regard to the person upon whose credit it was done. But it has been held that laws of such character seriously interfere with the alienation of such land and create great difficulty and embarrassment in procuring loans to be secured by a mortgage thereon. There is no reason why such a class of creditors should be entitled to the guardianship and aid of the State by granting them a security for their debts on the lands of another against his will and in restraint of the free enjoyment thereof, and such a law should not be extended beyond its plain terms. The lien, however, given by said act, where the owner has not himself contracted the debt, only extends to the amount due and payable by him at the time of filing notice, and this after deducting matters allowable by way of recoupment or counterclaim arising out of the contract between the owner and contractor, and which would be available against the contractor in an action by him.<sup>3</sup>

§ 46. **Material-man.** — It has become the settled policy of nearly all the States to secure the material-man equally with

<sup>1</sup> Greenough v. Nichols, 30 Vt. 768.

<sup>2</sup> Clough v. McDonald, 18 Kan. 114.

<sup>3</sup> Cheney v. Troy Hosp. Ass., 65 N. Y. 282.

the sub-contractor. His property enters into the edifice, and contributes with the labor of the mechanic to its increased value. Without the materials for construction there would be no opportunity for the expenditure of labor. Every building consists of these materials wrought upon and placed in definite structural positions, and without them there could be no building. Hence the justice and necessity of giving, to him who performs so important a part in the erection of every improvement, a remedy equally efficient with that possessed by the mechanic. In the early history of this law, this claim was not always recognized, and in some jurisdictions the lien for materials was confined alone to the contractor and mechanic who supplied them in conjunction with the work they performed. This distinction has been generally abolished, and the lien extended to the merchant or other person who furnishes the materials, irrespective of any other relation to the work. It will therefore be found that the principles and decisions referred to in the preceding and subsequent sections relating to sub-contractors are equally applicable, and for the most part refer as well to the material-man.

§ 47. **Material-man must come within the Law.** — The material-man, as others, must show that he is of the class the lien was intended to protect. Illustrative of this general proposition the following decisions may be found: "When any mechanic or undertaker, by special contract with the owner of any lot, or his agent, shall upon said land construct, either in whole or in part, or furnish materials in the construction of any house, fixtures, or improvements, such mechanic or undertaker shall have a lien," etc. This lien is given to the mechanic or undertaker, both for work done by himself or others under him, and for the materials such mechanic who contracts to erect the building, or any other person who may undertake it, shall furnish, but does not apply to the person from whom the undertaker may get the materials, or give him any lien.<sup>1</sup> So, where a code gives a lien "in favor of the mechanic" who does the work or furnishes the materials, no lien exists in favor of a person who is not a mechanic, for merely having furnished the materials without having aided in the construction.<sup>2</sup> "All artisans, builders, and mechanics of every description, who shall perform any work and labor on any building, shall have an absolute lien on such building for such work and labor, as well as for materials furnished by them in and about such work and labor." A lumberman is

<sup>1</sup> Greenwood v. Tenn. Man. Co., 2 Swan (Tenn.), 130.

<sup>2</sup> Allman v. Corban, 4 Baxt. (Tenn.) 74.

not an artisan, a builder, or a mechanic; and to no other does this statute extend a lien upon a building. That a mechanic or builder may include in his lien the price for materials furnished for the building, is his privilege; but that is no reason why one who furnishes materials, without doing any work, should have a lien. A man who sells lumber for a house has no lien upon it, any more than a merchant who sells nails to be used in the building, and neither has a lien, because the statute does not give it to him; while the mechanic has a lien for the same, or any other articles he may furnish, in consequence of his labor performed upon the house, because the statute does give him such lien. The law must be applied as it exists; and there is no power in the courts to extend a statute, restricted in terms to a particular class of persons, to a man not in that class.<sup>1</sup> Where a lien is given to "original contractors," these terms embrace material-men, if they contract with the owner.<sup>2</sup> A lien for materials exists in favor of one supplying the "contractor, architect, or builder." But one who merely contracts to furnish lumber for a building is not a contractor within the meaning of this law, and those from whom he buys have no lien.<sup>3</sup> A law giving the lien to "mechanics and artisans" does not extend to material-men.<sup>4</sup> So where a statute gives a lien "to mechanics and builders, on the buildings erected by them, and on the lot or parcel of land on which the buildings are situate, for the price or compensation agreed to be paid them, and for materials," it does not confer a lien in favor of persons having a claim only for materials furnished and used in the building.<sup>5</sup> In Indiana a sub-contractor furnishing materials for *repairs* has no lien; the contract of the claimant must be directly with the owner, or the materials and work must be on a *new* building.<sup>6</sup> To the same effect it was held, when "every mechanic, workman, or other person, doing or performing any work towards the erecting of any building, whether as journeyman, laborer, cartman, sub-contractor, or otherwise, should have the lien," etc., a lumber dealer, furnishing materials to a contractor, is not a person "doing or performing work towards the erection of the building," within the meaning of this law; notwithstanding that, in respect to a portion of the lumber furnished, he caused it to be dressed at a saw-mill in a particular way, to meet the order of

<sup>1</sup> *Duncan v. Bateman*, 23 Ark. 327,  
affirmed in *Bontner v. Kent*, 23 Ark. 389.

<sup>2</sup> [*Lane v. Jones*, 79 Ala. 156.]

<sup>3</sup> [*Brown v. Cowan*, 110 Pa. St. 588, 586, 588.]

<sup>4</sup> *Huck v. Gaylord*, 50 Tex. 578.

<sup>5</sup> [*Davis v. Betz*, 66 Ala. R. 206.]

<sup>6</sup> [*Woodward v. McLaren*, 100 Ind.

the contractor.<sup>1</sup> Again, where the law extends the lien only to the laborers who expend their labor upon the improvement, and a contractor, who furnished the labor and materials for, and was a dealer in sash, blinds, doors, etc., sold under contract the above articles of his trade, which were used in the construction of houses, some incidental work being required in fitting them, which was done by the dealer, it was held he was not entitled to a lien.<sup>2</sup> So a mechanics' lien law, which gives to "masons and carpenters" a lien on their work and materials found by them, for building and repairing houses, does not extend to the owners of mills who furnish lumber. They must, to entitle themselves to the benefit of the statutes, be actually masons or carpenters, and have contracted in that capacity or character.<sup>3</sup> A law which gives to "the mechanic or undertaker a lien on a lot of land for his work done in constructing, building, or repairing, either in whole or in part, and for furnishing materials in the construction," enures alone to the benefit of the mechanic or undertaker who builds or repairs the house. A person who merely furnishes the owner with the lumber to be used in such building or repairing, has no such lien for the price thereof, but stands upon the same footing with other creditors.<sup>4</sup> A statute extending a lien to "machinists" does not include those who merely vend machinery.<sup>5</sup> This subject is further elaborated in the construction of a statute which provided that "whenever any building, etc., shall be constructed by contract with or at the request of the owner thereof, etc., such building is hereby made liable, and shall stand pledged for all the work done in the construction of such building, and for the materials used in the construction thereof, which have been furnished by any person who had contracted or been requested, as aforesaid, to construct the same, before any other lien," etc. This act was designed to and does exclude mere material-men; and in its construction, in order to give effect to that exclusion, the materials which fall within its provisions must be taken to be such as are furnished by the person who furnishes labor, and must be intended for the work contracted for or requested to be done. They must be furnished for the work which he is employed to do, and be used therein.<sup>6</sup> Again, "when any contract shall be made between any proprietor and any other person, the person who shall fur-

<sup>1</sup> *Burst v. Jackson*, 10 Barb. 219.

<sup>2</sup> *Arnold v. Budlong*, 11 R. I. 561.

<sup>3</sup> *Pitts v. Bomar*, 33 Ga. 96.

<sup>4</sup> *Stevens v. Wells*, 4 Sneed, 387.

<sup>5</sup> *Kirkpatrick v. Bank of Augusta*, 30 Ga. 465.

<sup>6</sup> *Sweet et al. v. James*, 2 R. I. 270.

nish, in pursuance thereof, materials," etc., shall be entitled to a lien, does not extend to material-men furnishing on the order of a contractor, because a contractor is not proprietor.<sup>1</sup>

§ 48. **Sub-contractor and Material-man placed in same Position.**—As was remarked in regard to the sub-contractor, that he was not universally secured either a lien or right of action against the owner of the building for the unpaid balance due the contractor, so with the material-man. For unless the lien is specially given by statute a material-man would have no lien against the owner where he sold his materials to a contractor.<sup>2</sup> Nor could a personal judgment be rendered against the owner in such case.<sup>3</sup> It may, however, be asserted that, whenever the former is now protected, the same provisions are generally extended to the latter. Thus, where "every dwelling-house, etc., shall be subject to the payment of the debts contracted for, or by reason of any work done or materials found and provided by, any brickmaker, mason, etc., or any other person or persons employed in furnishing materials for, or in erecting, any such house, before any other lien," etc., the lien is extended equally to the sub-contractor and material-man who perform labor or furnish materials on the order of the contractor.<sup>4</sup> So the law which declares that "every building erected shall be liable for the payment of any debt contracted and owing to any person performing work or furnishing materials for the erection and construction thereof," is so comprehensive that, if it be left unconfined by subsequent restrictions, a lien will be given to all persons who, under any circumstances whatever, perform any labor in the erection of a building, or whose materials enter into its structure. And even where such a clause is qualified by a provision "that, when the building is erected in whole or in part by a contract in writing, the building and the land shall be liable to the contractor alone for work and materials done under such contract," an owner who claims exemption from the operation of the first section must bring his case within the proviso; and it is not enough to show that the work was done by contract simply in order to take away the right of the mechanic doing the labor or tradesman furnishing the materials; but he must show that the contract for the erection was in writing.<sup>5</sup> But where "every dwelling-house erected, the expense of which building to

<sup>1</sup> Shotwell v. Kilgore, 26 Mississippi, 125.

<sup>2</sup> Clark v. Hall, 10 Kan. 80.

<sup>\*</sup> Hodgson v. Billson, 12 Kan. 568.

<sup>4</sup> Winder v. Caldwell, 14 How. (U. S.) 434.

<sup>5</sup> Van Pelt v. Hartough, 31 N. J. L. 331.



the mechanic, or his services thereon, shall, with the land, be subject to the payment of what is due from the proprietor to the contractor," does not give a lien to a material-man, unless he is also a contractor. If, however, there be an amendment thereto, that "every building erected, the expense of which any person shall have a claim for materials furnished," a material-man need not be also a contractor to have the lien.<sup>1</sup>

§ 49. **Sub-contractor in Second Degree.**<sup>2</sup>—Although the sub-contractor and material-man have been secured, in many of the States, either a lien on the property or a right of action against the owner to recover any balance due the contractor on his contract, yet these privileges have been more rarely extended to sub-contractors in the second and third degree. The plainest expressions of law must be adduced to entitle them to the remedy.<sup>3</sup> Statutes which are opposed to common right and confer special privileges upon one class of community not enjoyed by others, should receive a strict construction, and parties claiming its benefits must bring themselves clearly within its provisions.<sup>4</sup> Thus, where a law made every building "subject to the payment of debts contracted for, or by reason of any work done or materials provided by any bricklayer, stone-cutter, mason, carpenter," etc., and providing that "no claim of any sub-contractor shall be a lien, except so far as the owner may be indebted to the contractor at the time of giving the notice," these provisions were said to be not unlimited in extending the privilege of the lien to any person who furnishes materials used in the construction of the building, to any degree and however remote from the first contractor. To allow the right of lien to a sub-contractor in the third or fourth degree or beyond would be impracticable, as well as imposing hardships which would follow in many supposable cases. If the right to the lien can be extended indefinitely, then it is very obvious there would be no safety in contracting for the erection of a building, and no prudent man would do it.<sup>5</sup> Again where "every sub-contractor or other person, who shall, in pursuance of the purposes of the original contract between the owner and the original contractor, perform any labor," etc., shall have a lien, the lien does not extend to a sub-contractor of a sub-contractor.<sup>6</sup> A law, there-

<sup>1</sup> Chapin v. Persse, 30 Conn. 461.

<sup>2</sup> [See § 60. This section approved in *Carlisle v. Knapp*, 51 N. J. L. 329, 331; *McGugen v. Ohio River R. Co.*, 33 W. Va. 63.]

<sup>3</sup> *Kerby v. McGarry*, 16 Wis. 68.

<sup>4</sup> *Bridge Co. v. L. N. A. R. Co.*, 72 Ill. 506.

<sup>5</sup> *Kerby v. McGarry*, 16 Wis. 68.

<sup>6</sup> *Bridge Co. v. L. N. A. R. Co.*, 72 Ill. 506; *Newhall v. Kastens*, 70 Ill. 156; *Ahern v. Evans*, 66 Ill. 125; *Rothberger v. Dupuy*, 64 Ill. 452.

fore, which extends the lien to a sub-contractor does not take in a party who stands to the owner in the position of a sub-contractor in the second degree.<sup>1</sup> A sub-contractor in the second degree has no lien under a statute giving a lien to those who are employed by the owner, his agent, or one contracting with them.<sup>2</sup> Where "every person who shall hereafter, as sub-contractor, material-man, or laborer, furnish to any contractor any materials, or who shall do or perform any work or labor for such contractor," the lien does not embrace sub-contractors.<sup>3</sup> Under an act that "every mechanic, workman, or other person, doing any work towards the erection of any building erected under a contract in writing between the owner and builder or other person, whether such work be performed as journeyman, laborer, sub-contractor, or otherwise, may deliver to the owner an attested account," etc., it applies only to the creditors of the original contractor. A creditor of a sub-contractor can claim nothing under such a law. If it were different, the operation of the act might be extremely oppressive upon the contractor; and his only protection would be in refusing to sub-contract the job, because if the remote workman under the sub-contractor, in whose contract the original contractor has no interest, over which he can exercise no control, and which therefore may be injudicious and extravagant for aught he can do, can, by presenting his attested account to the owner, collect it, so far as any balance due the contractor remains in his hands, the whole fund may be exhausted in spite of the contractor, though the job may have been but partially finished.<sup>4</sup> To make the original contractor liable for the debts of his sub-contractor *ad infinitum* would necessarily be injurious to the mechanics themselves, particularly to those of limited means. It would be unsafe in that case for the principal contractor to make any payments or advances to the sub-contractors who had undertaken to do particular portions of the work, until their several jobs were completed, and they had furnished to him conclusive evidence that all the journeymen and laborers employed by them respectively had been paid in full; and the various sub-contractors would have to raise money some other way to pay such journeymen and laborers, or those who actually did the work would have to wait until the sub-contract was fulfilled, so that they and the sub-contractor could be paid off by the original contractor at the same time, — the probable

<sup>1</sup> Harbeck v. Southwell, 18 Ill. 418.

<sup>2</sup> [McGugen v. Ohio River R. Co., 33 W. Va. 63; citing Phil. § 49.]

<sup>3</sup> Cairo v. Watson, 85 Ill. 531.

<sup>4</sup> Wood v. Donaldson, 17 Wend. 550.

effect of which would be to suspend the payments of the daily pittance which the journeyman frequently wants for the immediate use of himself and his family, or to compel the great mass of industrious and enterprising mechanics in our cities, who have as yet acquired no capital and but little credit, to become the mere journeymen of a few wealthy contractors, by placing them in a situation in which it would be impossible for them to obtain sub-contracts for a part of the work.<sup>1</sup> So where a lien is limited to "any contractor directly with the owner for the furnishing of labor or materials, and to any person who, under an agreement made by him with an original contractor, has performed labor or furnished materials used in such erection or alteration," an employee of a sub-contractor cannot acquire a lien under its provisions.<sup>2</sup> Again, where a statute gives the lien in favor of "persons dealing with the owner, or his agent, and to those who in pursuance of an agreement with any such contractor, and in conformity with the terms of the contract with such owner or agent, furnish materials," it does not include the creditor of a sub-contractor.<sup>3</sup> Under a statute which secured "every mechanic or other person doing any work towards erecting a building erected under a contract in writing between the owner and builder or other person, whether such work shall be performed as journeyman, laborer, cartman, sub-contractor, or otherwise, etc., may deliver to the owner an attested account," etc., it cannot be construed to give the remedy provided to one who has labored under employment by a sub-contractor.<sup>4</sup> In like manner, where "any person who shall furnish materials, etc., may file with such owner an account, and thereupon such owner shall retain, out of his subsequent payments to the contractor, the amount," etc., it only provides a remedy for a sub-contractor of the original contractor, and not for a sub-contractor of a sub-contractor.<sup>5</sup>

§ 50. **Same.** — The reasons adduced in the foregoing sections have had a tendency to produce a rather strict construction upon statutes alleged to extend the privileges of liens indefinitely, and a reaffirmance of the general principle that the claims of mechanics and laborers do not become liens on a house from the mere fact that the work was done; that they must, as stated in the preceding section, be expressly provided for by statute.<sup>6</sup> Thus where a statute gives a lien to "the person who shall

<sup>1</sup> Donaldson v. Wood, 22 Wend. 395.

<sup>2</sup> Heroy v. Hendricks, 4 E. D. Smith, 768.

<sup>3</sup> Fowler v. Buffalo, 43 N. Y. Superior Ct. 525.

<sup>4</sup> Turcott v. Hall, 8 Ala. N. S. 522.

<sup>5</sup> Stephens v. United Railroad S. Y. Co., 29 Ohio, 227.

<sup>6</sup> Harlan v. Rand, 27 Penn. 511.

actually perform labor in erecting, etc., for the payment of the amount due him for such labor and materials," it does not allow a plasterer to recover the wages of a journeyman or laborer; but it does for his own labor and that of the apprentice. An apprentice earns no wages for himself, and therefore he can have no lien; for, having no claim for personal compensation, he has no occasion for security. It is otherwise with a journeyman. He earns wages; he is entitled to payment for labor performed, and may have, in his own behalf, a lien upon the land upon which he has wrought.<sup>1</sup> A journeyman plasterer, under a similar statute, was held to have no lien.<sup>2</sup>

§ 51. **Material-man in Second Degree.** — The principles which prevented parties who supplied labor to the sub-contractor from claiming a lien upon the property of persons who were so far removed from them, apply with equal force to those who furnish materials to a material-man or sub-contractor. They have no right to fasten the lien upon the estate, unless expressly authorized by law. Thus where the statute gives to "an architect, builder, or contractor for the erection of a building, the power to create liens on the building," this right does not extend to a lumber dealer, employed merely to furnish lumber, whether manufactured or not. He is simply a material-man, and persons furnishing materials to him have no lien. An architect, builder, or contractor is the agent of the owner for erection; and it can readily be perceived how, as agent, he should have power to subject the building to a lien to the workmen and material-men. But such contractor must be one within the contemplation of the statute; namely, a person employed to erect or construct the building. It is the contract for erection which communicates the owner's power to bind the building. There is, however, a palpable distinction between a contract to erect and a contract to furnish towards the erection, whether it be work or materials. One who contracts to put up a building, or one of its leading divisions, as its brick-work or its wood-work, is not a mere workman or a mere material-man. He is employed to construct or erect, and not merely to work. It is therefore clear that a lumber dealer, employed merely to furnish lumber, whether manufactured or not, is not a contractor for the erection of the building or any division of it. He is a material-man merely, or a workman, if he works up his lumber into frames, doors, etc., and is not employed to erect or put up the building or any of its primary divisions. Not having assumed the relation

<sup>1</sup> *Parker v. Bell*, 7 Gray, 429.

<sup>2</sup> *Fox v. Rucker*, 30 Ga. 525.

of contractor or builder, there is no privity between him and the owner to enable him to charge the building with a lien for the lumber he purchases of others, in order to fill his own contract to furnish the lumber of the house.<sup>1</sup> Under a law making property subject to liens for work and materials supplied, under contract with the owner or his contractor, "to erect or construct the building," a material-man to furnish lumber is not such a contractor, and cannot bind the building for lumber furnished him by another. Neither can a contractor to put in an elevator, make the building responsible to the lien of one whom he engaged to furnish the cage for it. But the above law does not confine the construction of a building to a single contractor. The owner may commit its main divisions to different contractors, with power to each in his department to bind the building with a lien. The contract for an elevator was not for a primary division of the building; the contract was minor and auxiliary.<sup>2</sup> But a party who furnishes materials for a sub-contractor comes within a law that gives a lien to "any person who shall, in pursuance of any contract, express or implied, either with the owner of the property or any contractor, perform any labor or furnish materials, etc., or any person who has made a contract for the same, shall be deemed to have an equitable lien for the same upon such house," etc.<sup>3</sup> So under a code that provides that "mechanics and all persons performing labor or furnishing materials for the construction or repair of any building, etc., may have a lien," etc., and "the provisions of this act shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs, etc., unless furnished to the owner of the land on which the same may be situate," etc., — it is not necessary, if materials be furnished and used for a new building, that they should be furnished to the owners of the lots who are erecting the building, or to their immediate contractor. If they be furnished to a sub-contractor, and used in the erection of a new building, this is all that is necessary to give the party furnishing a right to acquire a lien for their value.<sup>4</sup> In Nebraska one furnishing materials to a sub-contractor has a lien.<sup>5</sup>

§ 52. **When Mechanical Laborers, etc., entitled.**<sup>6</sup> — It is competent for the law-making power to extend the lien to all persons performing labor towards the erection of buildings, irrespective

<sup>1</sup> *Duff v. Hoffman*, 63 Penn. 191.

<sup>2</sup> *Schenck v. Ueber*, 81 Penn. 31; *Kitson v. Crump*, 9 Phila. 41.

<sup>3</sup> *Lumbard v. Syracuse R. R. Co.*, 64 Barb. (N. Y.) 609.

<sup>4</sup> *Barker v. Buell*, 35 Ind. 297.

<sup>5</sup> [*Stewart Chute Lumber Co. v. M. P. R. Co.*, 28 Neb. 39.]

<sup>6</sup> The above section was cited with approbation in *Waldroff v. Scott*, 46 Tex. 1.

of remoteness of contract. The creation of a lien does not require the affirmative consent of the owner of the building to which it attaches. If he has authorized the employment of the laborer contemplated by the statute, the lien attaches by operation of law. It has accordingly been held, where a law declares "that any person to whom a debt is due for labor performed or furnished in the erection of any building, by virtue of an agreement with, or by consent of, the owner of such building, or any person having authority from, or rightfully acting for, such owner, in procuring or furnishing such labor, shall have a lien," a lien may be enforced for labor done in the erection of the building by a person employed by a sub-contractor.<sup>1</sup> So where a law gives a lien to workmen who perform labor "by virtue of the consent of the owner," if the owner makes a contract with a contractor for the erection of a tenement, the law implies such consent and authority to the contractor to do all acts necessary to enable him to complete the work, and to employ persons to perform labor thereon.<sup>2</sup>

§ 52 a. **When Day Laborers, etc., entitled.** — When either the terms of the law or its scope necessarily implies that its provisions are intended to protect the mere laboring classes, courts have uniformly given effect to the law. As, for example, "whenever any building, turnpike, railroad, or other improvement shall be constructed, etc., by contract with, or at the request of, the owner thereof, such owner being at the time the owner of the land on which the same then is, such building, etc., together with the land, is hereby made liable, and shall stand pledged for all the work done in the construction, and for the materials used which have been furnished by any person who had contracted or been requested to construct, erect, or repair any building, canal, turnpike, and railway." Although the term "mechanic" may be used in the title of the act, still it is apparent that the construction of a turnpike would call for very little labor commonly termed mechanical; or indeed, if any distinction is to be made between that and other labor, the law would give a lien for a very small portion of the improvements made by a contractor, in the building of the road, because the great portion of the work required for its construction is mere digging and grading, and such as must be done by mere laborers. If the whole were done by contract, it would not require, or be naturally expected, that the contractor should be a mechanic; thus it is clear that such contractor was designed

<sup>1</sup> Clark v. Kingsley, 8 Allen (Mass.), 543.

<sup>2</sup> Weeks v. Walcott, 15 Gray (Mass.), 54.

to be protected as much as the housewright or mason. It is evident by the intent of the act, that, while mechanics were secured for their labor, all other persons who had contracted or been requested to make repairs upon the real estate of another should also be protected.<sup>1</sup> So, where laborers are given a lien for their labor, and it is provided that "in selling buildings under the provisions of this act, a reasonable amount of land will be sold with them, not to exceed two acres, surrounding the building," it thus impliedly gives laborers a lien on the same.<sup>2</sup> Where every "laborer" is entitled to a lien for his "work or labor done" on a railroad, a day laborer is entitled to a lien thereon for his wages.<sup>3</sup> Again, where "laborers" are given a lien, a mechanic who performs manual labor is entitled to such lien.<sup>4</sup> But it is not every "laborer" in the generic sense of the term that will be thus protected. A party seeking to enforce a lien must bring himself wholly and technically within the statute granting the relief. Thus where "all laborers who shall perform work and labor, etc., if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor," the word "all," as used in this act, is not to be construed literally as giving to every laborer a lien for his labor. For example, the clerk of a merchant or banker, in one sense of the word, is a laborer, and so are ordinary house-servants; but they do not come within the purview of the above act, because they produce nothing to which a lien could attach; so a laborer on a railroad does not come within the class described, as being entitled to "a lien on the production of their labor." But ordinary farm hands, employed in the cultivation of a crop, would have a lien on the crop produced by their labor, under the above statute.<sup>5</sup> Hay is a "production" of the laborer who cuts and rakes the grass, and he has a lien upon it for the price or value of his work.<sup>6</sup> In another case under the same law, it was said that in all such cases, the remedy being summary, and contrary to the course of the common law, a "laborer" must bring himself strictly within its provisions. That the word "laborer," from the context, was to be understood in its ordinary sense as distinguished from mechanic or artisan, as used in other lien acts.<sup>7</sup> In Georgia a laborer has a special lien on the products of his labor and a general lien on all the debtor's property. If

<sup>1</sup> Sweet v. James, 2 R. I. 270.

<sup>2</sup> Taylor v. Hathaway, 29 Ark. 597.

<sup>3</sup> Mornan v. Carroll, 35 Iowa, 22.

<sup>4</sup> Adams v. Goodrich, 55 Ga. 234.

<sup>5</sup> Dano v. M. O. & R. R. Co., 27 Ark. 567.

<sup>6</sup> [Emerson v. Hedrick, 42 Ark. 263.]

<sup>7</sup> Taylor v. Hathaway, 29 Ark. 601.

the laborer wishes to cover other property than the product of his labor he must claim a general lien.<sup>1</sup> A laborer employed by the contractor has no lien under a statute providing for a lien where a person performs labor "for or on account of the owner, agent, or assignee."<sup>2</sup> But in California a laborer has a lien on the building on which he works at the request of the contractor.<sup>3</sup> Clerks in a store are not laborers within the lien law,<sup>4</sup> unless they do manual labor,<sup>5</sup> and then they have a lien only for such labor. And a "farm overseer" is not a "laborer" within the meaning of the Arkansas lien laws.<sup>6</sup> In another court the term "laborer" was held not to include a time-keeper or superintendent.<sup>7</sup> But under a law giving a lien to "any person who shall perform any work or labor on any mine," etc., it was held that one employed to direct the laborers was entitled to a lien. The law was not meant for the exclusive benefit of any class of workers, but for all.<sup>8</sup> Where the language of the law is, that "mechanics and laborers shall have a lien upon the property of their employers for labor performed," a creditor will not have a laborer's lien for work which he has done for the debtor by other persons hired by him to do the work.<sup>9</sup> The Arkansas statute gives one who labors for a contractor a lien for his work done after notice to the owner of the property or improvement, and his lien will not be defeated by subsequent payment of his wages to the contractor.<sup>10</sup> A statute gave "employees of any corporation a lien for all work and labor done," etc. : held, that under such a law an employee is a servant, bound in some degree at least to the duties of a servant, and not a mere contractor, bound only to produce or cause to be produced a certain result, — a result of labor, to be sure, — but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party.<sup>11</sup> And where a party contracts to put up certain lines of wire on poles, he is not an employee, nor entitled to a lien secured exclusively to employees.<sup>12</sup> One who under contract with a telegraph company strings wires on their poles is not an "employee," and cannot claim a lien under a statute providing

<sup>1</sup> [Boyce v. Poore, 84 Ga. 574; Bramblet v. Lumsden, 80 Ga. 707.]

<sup>2</sup> [Gross v. Eiden, 53 Wis. 543, 545.]

<sup>3</sup> [Patent Brick Co. v. Moore, 75 Cal. 206.]

<sup>4</sup> [Hinton v. Goode, 73 Ga. 233; Richardson v. Langston, 68 Ga. 658.]

<sup>5</sup> [Ricks v. Redwine, 73 Ga. 273.]

<sup>6</sup> [Flourney v. Shelton & Co., 43 Ark. 168.]

<sup>7</sup> M. K. & Tr. Co. v. Baker, 14 Kan. 563.

<sup>8</sup> [Cullins v. Flagstaff Silver M. Co., 2 Utah, 219.]

<sup>9</sup> Cochran v. Swann, 53 Ga. 39.

<sup>10</sup> [Buckley v. Taylor, 51 Ark. 302.]

<sup>11</sup> [Vane v. Newcombe, 132 U. S. R. 220.]

<sup>12</sup> [Idem.]



a lien for employees, an employee is a servant,<sup>1</sup>—a very narrow and unspiritual decision. The reason and spirit of the law covers those employed by the job as well as those employed by time.

§ 53. **Corporations.**—No good reason is perceived why corporations, acting within the powers conferred by their charters, and where there is nothing in the lien law to indicate a contrary intention, may not acquire liens as individuals.<sup>2</sup> Thus, where the law gives "any machinist" a lien, a corporation engaged in the business of making machinery is entitled to a lien the same as a natural person so engaged.<sup>3</sup> The word "person" includes a corporation.<sup>4</sup> In another case it was held that there is no difference in a law giving sub-contractors a lien, between a railroad which may be a sub-contractor and any other individual.<sup>5</sup> The work performed or materials furnished, however, must be within their authorized powers. Where a corporation was organized for the purpose "of manufacturing and selling lumber," it could not hold a lien for labor performed in the construction of a building. The public have an interest in the creation of corporations. The object of every grant of corporate powers is to obtain a public benefit. The powers granted are the consideration which the public gives for the benefit received or expected. Every application of or dealing with the capital or any funds of the corporation, in any manner not distinctly authorized by its charter, is illegal and void. Corporations are created for public reasons alone; and the legislature is presumed in every instance to have carefully considered the public interest, and to have just granted so much power and so many peculiar privileges as those interests are supposed to require. It cannot be contended that, although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such chartered powers. To speak of the powers of a corporation, it is understood to refer to the privileges and franchises which are created in the charter, and which control and circumscribe the legal acts of the corporate body. Whenever it goes beyond the privileges and franchises therein mentioned, its acts become illegal and void. So far as the charter appears, the above corporation

<sup>1</sup> [B. & M. Tel. Co. v. Tel. Co., 27 Fed. R. 536.]

<sup>2</sup> [65 Tex. 324, *infra*.]

<sup>3</sup> London v. Coleman, 59 Ga. 653.

<sup>4</sup> [Doane v. Clinton, 2 Utah, 417; Fagan & Osgood v. Boyle Ice Mach. Co., 65 Tex. 324.]

<sup>5</sup> Sandval v. Ford, 55 Iowa, 464.

had only the right to manufacture and sell lumber. Where such a corporation sued to enforce a lien for both lumber furnished and labor performed in the construction of a building, and the complaint failed to show how much of the gross amount was for lumber furnished, no judgment could be given for the gross amount claimed. The blending, however, of the two accounts together, and taking a promissory note for the whole amount, does not necessarily vitiate the claim of the corporation for the legal part thereof. That part may be shown by parol.<sup>1</sup> Liens in the nature of mechanics' liens cannot be filed by a municipal corporation to enforce municipal charges, unless authorized by statute.<sup>2</sup> So where proprietors are required by law to pave, and upon failure the authorities shall do it, adding twenty per cent, such provision is penal; and the claim is not that of a mechanic under the lien law.<sup>3</sup>

<sup>1</sup> Dalles L. & M. Co. v. Wasco Woollen M. Co., 3 Oreg. 527.

<sup>2</sup> Borough of Mauch Chunk v. Shortz, 61 Penn. 399.

<sup>3</sup> Yates v. Borough of Meadville, 56 Penn. 21.

## CHAPTER VI.

### ASSIGNMENT.

§ 54. **When not assignable.** — Great diversity of opinion exists as to the assignability of mechanics' liens. Three different rules seem to be adopted in the several States. 1st, that the lien is personal and cannot be assigned. 2d, that the proceedings to be taken to enforce the lien must be in the name of the assignor, but subject to these restrictions the lien is assignable. 3d, that the lien is as assignable as any other debt, and the proceedings may, if allowed by the practice in other suits, be brought in the name of the assignee. This contrariety has arisen from the interpretation of the different lien laws of the several States, qualified by the general practice as to the assignability of *choses in action*. It has been decided in the following cases that the lien is a personal privilege and not assignable. Under a statute that "every person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting or repairing any building, or the appurtenances of any building, on such land, shall have a lien," etc., the lien was considered to be personal to the contractor or sub-contractor, and therefore not assignable.<sup>1</sup> So, where "all laborers who shall perform work and labor, etc., if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor," the lien is personal and cannot be assigned.<sup>2</sup> An inchoate right of lien is not assignable, but when the lien has been perfected it passes with assignment of the debt.<sup>3</sup> An assignee of a laborer's account cannot file a lien. The right to create a lien is not assignable.<sup>4</sup> The legislature is deemed to have given the

<sup>1</sup> Fitzgerald v. First Presb. Church, 1 Mich. (N. P.) 243.

<sup>2</sup> Dano v. M. G. & R. R. Co., 27 Ark. 566.

<sup>3</sup> [Goodman v. Pence, 21 Neb. 459, 462.]

<sup>4</sup> [Brown v. Chicago, &c. Ry. Co., 36 Mo. App. 458, 461, citing Davis v. Bilsland, 18 Wall. 659; Tewksbury v. Bronson, 48 Wis. 581; Brown v. Harper, 4 Oregon, 89; Rollin v. Cross, 45 N. Y. 766; Roberts v. Fowler, 3 E. D. Smith, 635; First National

Bank v. Day, 52 Iowa, 680; Merchant v. Water Power Co., 54 Iowa, 451; Brown v. Smith, 55 Iowa, 31; Langan v. Sankey, 55 Iowa, 52; Caldwell v. Lawrence, 10 Wis. 331; Daubigny v. Duval, 5 T. R. 604; Pearsons v. Tinker, 36 Me. 384; Ruggles v. Walker, 34 Vt. 468. To the same effect Griswold v. Carthage, &c. Ry. Co., 18 Mo. App. 63. The lien is a personal right of the laborer, meant for his own individual protection, and the right to create it cannot be transferred.]

privilege for the individual protection of the mechanic; and the right to create it cannot be transferred to another, unless the assignment is made for the benefit of the assignor, and to be held by the assignee as his agent, so that the lien may be preserved.<sup>1</sup> But after the lien claim is filed the debt and right to enforce the lien may be assigned.<sup>2</sup>

§ 54 *a*. **When assignable, but Proceedings must be in Name of Assignor.** — In a number of States it has been held that the lien is so far personal that the proceedings to enforce it must be taken in the name of the party secured by statute. The decisions announcing this doctrine are generally founded on the phraseology of the lien law under interpretation. The tendency of decision is to hold that, although a statute may contemplate the perfecting of a lien by the personal acts of the mechanic, yet when perfected, it will be deemed assignable.<sup>3</sup> In Illinois, a mechanics' lien is so far a personal right, that the proceeding to establish it, even if it has been assigned, should be carried on in the name of the assignor, and there was held no error in entering a decree in the name of the assignor for the use of the assignee.<sup>4</sup> In Iowa, although it is declared by statute that, "a mechanics' lien is assignable and shall follow the assignment of the debt," the mere right to the lien is not assignable, as the above statute refers to the lien perfected by the filing of a claim therefor, and not to the inchoate right to a lien, as the mere performance of labor is not sufficient to give a lien, until the statute has been complied with.<sup>5</sup> In another case it was said, unless the statute authorizes the filing of a claim by an assignee, there is no authority for him to claim, from the owner of property, money to which otherwise he has no right. And where throughout the whole act the right of lien and the right to enforce it appear to be confined to the contractor, laborer, or persons furnishing materials, and where in no instance is the assignee of such claim recognized in connection with the creation or enforcing of the lien, there can be no construction given to such a statute, other than as conferring a mere personal right on the contractor, laborer, etc., and not on his assignee. And this construction has been held to prevail, although one of the

<sup>1</sup> Rollin v. Cross, 45 N. Y. 767; Hubbell v. Schreyer, 14 Abb. Pr. N. S. 234. Though the assignment of the contract is prevented, payment due thereunder may be assigned. Young Stone Co. v. Wardens, 61 Barb. 489.

<sup>2</sup> [Oliver v. Fowler, 22 S. C. 534, 536.]

<sup>3</sup> Brown v. Harper, 4 Oreg. 89.

<sup>4</sup> Phoenix Mut. Ins. Co. v. Batchen, 6 Bradw. (Ill.) 621; Cairo & Vin. R. v. Fackney, 78 Ill. 119.

<sup>5</sup> Brown v. Smith, 55 Iowa, 32; Langan v. Sankey, Id. 52.

sections of the act provides that the lien may be discharged by filing a certificate of the claimant or his successors in interest, and a general practice act directs actions to be brought in the name of the party in interest; or, in other words, that notwithstanding both the statutes recognize a transfer of the claim, yet they confine such transfer to a time subsequent to the filing of the claim.<sup>1</sup> In Maine, on a review of the cases, it was held that the weight of authority and reasoning is in favor of the assignability of the lien of a mechanic and the right of the assignee to assert his claim in the same manner and to the same extent that the mechanic could, yet the suit, unless allowed by statute, cannot be in the name of the assignee, but may be in the name of the assignor. The assignment of the claim carries, *per se*, the right to its enforcement.<sup>2</sup> So in Indiana it is held that a mechanics' lien is assignable in equity. Whatever carries the claim, carries the security.<sup>3</sup> When a builder who has completed his contract assigns his rights under it to C. with the owner's knowledge, C. becomes the equitable assignee of the avails of the contract and of the lien arising therefrom.<sup>4</sup> Again, where a statute says nothing on the subject of assigning mechanics' liens, neither allowing it nor expressly prohibiting it, but providing that "the mechanic or material-man may file his claim," an assignee of the claim was held not able to prosecute it in his own name, and avail himself of its privileges.<sup>5</sup> So it has been decided that a party who, at the request of the debtor, advances money to pay to a third person his claim for services, does not thereby acquire a right to enforce the lien in his own name for a reimbursement.<sup>6</sup> Where A. agreed to build a house for B., and A. assigned his contract to C., who proceeded with the work with B.'s consent, it was held that the right to file a lien in A.'s name passed to C. although A. had taken no steps to secure a lien.<sup>7</sup>

§ 55. **When assignable.**<sup>8</sup> — The authorities on the other side, sustaining the right of assignment, affirm there is no reason in the nature of things why an assignment of the debt and the lien

<sup>1</sup> *Roberts v. Fowler*, 4 Abb. Pr. (N.Y.) 263; s. c. 3 E. D. Smith (N. Y.), 632.

<sup>2</sup> *Murphy v. Adams*, 71 Me. 118; [*Phillips v. Vose*, 81 Me. 134, 137.]

<sup>3</sup> [*Midland R. Co. v. Wilcox*, 122 Ind. 84, 91; *Major v. Collins*, 11 Bradw. 658; *Friedman v. Roderick*, 20 Bradw. 622; *Texas, &c. R. Co. v. McCaughey*, 62 Tex. 271; *Austin, &c. R. Co. v. Daniels*, 62 Tex. 70.]

<sup>4</sup> [*Major v. Collins*, 11 Bradw. 658, 664.]

<sup>5</sup> *Caldwell v. Lawrence*, 10 Wis. 331.

<sup>6</sup> *Pearsons v. Tincker*, 36 Me. 384.

<sup>7</sup> [*McDonald v. Kelly*, 14 R. I. 335, 338, citing Phil. § 55.]

<sup>8</sup> [*Cited in McDonald v. Kelly*, 14 R. I. 335, 338.]

should not be valid; that there is nothing in the lien right of the nature of a personal trust. The lien-holder is not intrusted with the possession of the property bound by the lien. His lien is a security, and it makes no difference to the owner who holds the lien. His duty is to pay the debt. If he pays it his property is discharged. If he fails to pay it, and so loses the property, of what moment is it to him whether the lien is enforced by the mechanic or his assignee? Besides, the law is designed for the protection of the material-man, the mechanic, and other persons performing labor upon buildings, and it is apparent that the right to dispose of his lien, to realize from it without waiting for the slower process of the law, may be of great advantage to the lien-holder.<sup>1</sup> The position assumed in the preceding case is fortified by analogy to other instances of liens on real estate, passing by a transfer of the debt they secure. A creditor by the Roman law, by a simple assignment or cession of the debt, transferred to his assignee all the accessory obligations, powers, hypothecations, and securities by which it was secured to him. If a lien creditor could not transfer his privileges with his debt, it was considered that he did not have the full benefit of his contract.<sup>2</sup> So, as a general rule, the indorsement of the notes secured by a mortgage carries with it the mortgage.<sup>3</sup> The transfer of a judgment debt is accompanied by the lien of the judgment; and the assignee of a legatee whose legacy is a lien or charge upon land may enforce its payment by bill in equity against the owners of the land.<sup>4</sup> The contract and lien of a mechanic may therefore, when the statute is entirely silent on the subject, be assigned precisely as any other *chose in action*, the assignee taking subject to the equities of the parties.<sup>5</sup> To the same effect, in another court, it was said although a statute is silent as to the assignability of these liens, they are assignable and may be enforced by an action in the name of the assignee. A number of liens may be assigned to one party for the purpose of bringing suit, as assignee.<sup>6</sup> One H. brought an action to foreclose a mechanics' lien, and there being a number of small liens against the same property they were assigned to him, and an action brought thereon in his own name. Held that, as the assignment of such liens was in the

<sup>1</sup> Tuttle v. Howe, 14 Minn. 145; Iaege v. Bossieux, 15 Gratt. (Va.) 83.

<sup>2</sup> The Hull of a New Ship, Davies, 199.

<sup>3</sup> Stewart v. Preston, 1 Fla. 10; Page v. Pierce, 6 Fost. (N. H.) 317.

<sup>4</sup> Crawford v. Severson, 5 Gill (Md.), 443.

<sup>5</sup> Iaege v. Bossieux, 15 Gratt. (Va.) 83.

<sup>6</sup> Skyrme v. Occidental Mill, 8 Nev. 219.

interest of economy, not only on behalf of the lien holders, but also on behalf of the defendant, therefore an order of the court continuing such liens in force, and permitting the plaintiff to acquire the beneficial interest as well as the legal title so that suit might be in the name of the real party in interest, would be sustained.<sup>1</sup> In Nebraska it has been decided that, unless prohibited, a mechanics' lien is assignable, and the assignee thereof may maintain an action to foreclose the lien.<sup>2</sup> In Montana the lien follows the assignment of the account of the labor.<sup>3</sup> A provision in a building contract that the contractor should not, without the written consent of the owner, assign any of the moneys payable thereunder, under penalty of forfeiture, etc., is for the benefit and protection of the owner alone, against the dereliction or insolvency of the contractor; and if an instalment of the moneys not yet due be assigned to material-men, and notice thereof given to the owner without his exception, subsequent creditors of the contractor can derive no advantage therefrom.<sup>4</sup>

§ 55 *a*. **What amounts to an Assignment.** — Usually no particular form of words is necessary to create an assignment of the lien; it is sufficient if the intent is shown.<sup>5</sup> Thus, a purchaser of a note given in settlement of a balance due on a building contract and maturing within the time allowed by law, for suing to enforce a lien, is entitled to a lien against the building for the amount of the debt evidenced by the note, and may enforce it in his own name, without any assignment of the account filed by the contractor to establish the lien.<sup>6</sup> So, where a promissory note has been given for part of the debt for which a mechanics' lien has been filed, the amount may be recovered by the claimant holding the note which has been dishonored.<sup>7</sup> This right of lien also survives to an executor or administrator,<sup>8</sup> and passes by assignment to the remaining partners of a firm on dissolution.<sup>9</sup> So any member of a firm has the right to use the name of the firm to perfect the lien; and this although the member has become sole owner of the claim.<sup>10</sup> But, where a party has failed to have his lien recorded and has lost it thereby, an as-

<sup>1</sup> [Hoagland v. Van Etten, 31 Neb. 292.]

<sup>2</sup> Rogers v. Omaha Hotel Co., 4 Neb. 54.

<sup>3</sup> Mason v. Germaine, 1 Mont. 263.

<sup>4</sup> Burnett v. Jersey City, 31 N. J. Eq. 341.

<sup>5</sup> Skyrme v. Occidental Mill, 8 Nev. 219.

<sup>6</sup> Jones v. Hurst, 67 Mo. 568.

<sup>7</sup> Johns v. Bolton, 12 Penn. 339.

<sup>8</sup> Tuttle v. Howe, 14 Minn. 145.

<sup>9</sup> Busfield v. Wheeler, 14 Allen (Mass.), 139; Hubbell v. Schreyer, 14 Abb. Pr. n. s. 284; Westervelt v. Levy, 2 Duer (N. Y.), 354.

<sup>10</sup> Jones v. Hurst, 67 Mo. 568.

signment of the debt by him, "with all rights and liens," passes no lien to the assignee, as the assignor had none to transfer.<sup>1</sup> But, on the other hand, it has been said, that it seems, unless some authority is given, the mere assignment of a claim for which a mechanic might enforce a lien does not operate as a transfer of the lien. And even where such right might be assigned, it was held that where a mechanic executed a draft upon a third person, which he sold to a vendee, stating that he held a mechanics' lien for the indebtedness of the drawee to him, such facts would not constitute an implied contract for the assignment of the lien to the vendee.<sup>2</sup> Particularly would no assignment of the lien be intended, by the assignment of an instalment due a mechanic for work before the completion of his contract.<sup>3</sup> Again it has been held that where a negotiable note has been given to a builder in settlement of his account for building a house, its mere indorsement and delivery by the builder to a third person does not *per se* operate as an assignment of the right of lien to the indorsee.<sup>4</sup> If any particular form of assignment is required by statute, it must be complied with. As under a law which required that "every conveyance whereby real estate is aliened, mortgaged, assigned, charged, or affected, must be in writing," a mechanics' lien, being in the nature of a mortgage and a charge on the land, could only be assigned in writing. The lien would not pass except by the transfer of the account; and as the account carried with it the lien, which was an encumbrance on the land, it also had to be in writing.<sup>5</sup> An assignee for benefit of creditors may enforce a lien held by the assignor.<sup>6</sup> An oral assignment of the claim on which the lien is based is sufficient.<sup>7</sup> A person having a lien upon logs for labor performed thereon may, with the assent of the debtors, assign a part of his claim to another person having a similar lien; and the latter may enforce the lien for the part thus assigned, together with his own lien, against persons purchasing the logs from such debtors.<sup>8</sup>

§ 56. **Rights of Assignee.** — In one State, where both the lien and *choses in action* are assignable, it has been held that the assignee of a mechanic's account and lien may sue without joining the contractor as party plaintiff, although the mechanics'

<sup>1</sup> Hooper v. Sells, 58 Ga. 127.

<sup>2</sup> First Nat. Bank v. Day, 52 Iowa, 680.

<sup>3</sup> Merchant v. Ottumwa, 54 Iowa, 451.

<sup>4</sup> St. John v. Hall, 41 Conn. 522.

<sup>5</sup> Ritter v. Stevenson, 7 Cal. 388.

<sup>6</sup> [German Bank v. Schloth, 59 Iowa, 316, 320, 321.]

<sup>7</sup> [Patent Brick Co. v. Moore, 75 Cal. 206.]

<sup>8</sup> [Kline v. Comstock, 67 Wis. 473.]



lien law, in declaring who shall be parties, enacts that "the parties to the contract shall, and all other persons interested in the matter in controversy, and in the property charged with the lien, may be made parties."<sup>1</sup> And where the lien may not be assignable, yet it seems that an assignment of the debt would enable the assignee to prosecute the lien in the name of the mechanic. The latter would be justified in doing any act in aid of the claim which the law accords; and, if he neglected to act, the assignee might perform, in the assignor's name, whatever is permitted for the security or enforcement of the demand.<sup>2</sup> The assignee of the contractor's claim or note from the owner may bring a bill in equity to foreclose the lien.<sup>3</sup>

<sup>1</sup> *Goff v. Papin*, 34 Mo. 177.

<sup>2</sup> *Hallahan v. Herbert*, 11 Abb. Pr. 622; *Major v. Collins*, 11 Bradw. 658. (N. Y.) N. S. 326; *Palmer v. Merrill*, 6 Cush. (Mass.) 282.

<sup>3</sup> [*Sheirick v. Roderick*, 20 Bradw. 622; *Major v. Collins*, 11 Bradw. 658.]

## CHAPTER VII.

## RELATION OF OWNER TO SUB-CONTRACTOR AND OTHERS.

§ 57. **Systems adopted for Protection of Sub-contractor, etc.**<sup>1</sup>—The protection of the sub-contractor and material-man, with a just regard to the rights of the owner of property, has been a subject of much solicitude with most of the legislatures. Two systems seem principally to have been adopted. The one in Pennsylvania, which was the first, where the mechanic who did the work, and material-man who supplied the articles used, were deemed entitled to protection, rather than a mere builder or undertaker of contracts, made provision that the sub-contractor and the material-man should have a lien, *for whatever sum might be due them*, directly on the building and land upon which it stood, and subordinating the lien of the contractor thereto. The other was the plan adopted in New York, which did not secure to any one, except the original contractor, an absolute lien on the property for the whole sum due, but by a species of equitable subrogation allowed the sub-contractor and material-man to give written notice to the owner of his unpaid claim, requiring the owner *thereupon to retain such funds as were in his hands belonging to the contractor* to answer the suit of the sub-contractor, and securing the same either by a lien on the interest of the owner in the property, or by a right of action against him, — the payment of this sum to operate as a valid set-off against any demand of the contractor. So far as there is any natural justice in the right of lien, it is evident that the sub-contractor and material-man have equally as meritorious claims for protection as the contractor. They are frequently more intimately connected with the work itself, and in most cases the erection is due exclusively to them. The difficulty has been to secure them without at the same time doing injustice to the innocent owner. The plan of conferring on them a right of lien for all sums which may be due them, irrespective of payments already made

<sup>1</sup> This section was cited with approbation in *Hunter v. Truckee Lodge*, 14 Nev. 41.

by the owner to the contractor, has not met with much favor in later legislation. The tendency has been rather to confine their right to what may be owing by the owner at the time of notice to him of their claims.

§ 58. **Where Sub-contractor has a Lien for whatever may be due him.** — The remedy adopted in those States which secure a lien on the land directly to the sub-contractor, for the entire amount of his claim, generally provides that "the building erected shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection of the same."<sup>1</sup> In discussing the rights secured by this statute, it has been said: The phraseology of this law proves that this lien, like all analogous liens, is founded on contract, express or implied. And here, contrary to the rule as to other liens, the law gives a lien even in favor of a sub-contractor. On what principle is it founded? It must be on contract with the owner, either directly or indirectly; for it is only thus that one man can ever acquire a claim upon the property of another. And in this way the connection is plain. The owner contracts with a builder to erect a house on certain terms, and the builder makes a sub-contract with a material-man to supply the materials. The chain of relationship consists of but two links, the second of which hangs by the first, and will bear no greater weight. The sub-contractor comes in by reason of his direct contract relation to the builder; and the right of lien of the former for his claim is *pro tanto* substitutionary to that of the latter. As against the owner the terms of the principal contract, and as against the builder the terms of the sub-contract, limit and qualify the lien of the sub-contractor, so as to prevent his claim from abating the terms of either contract. The allowance of any lien at all to a sub-contractor is a special privilege, granted only in case of buildings; and it is not unreasonable to require him to look to the principal contract, to ascertain whether it is such as to justify him in becoming a contractor under it.<sup>2</sup> A building contract provided that there should not be "any legal or lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished," and that the owner "will not in any manner be answerable . . . for any of the materials or other things used and employed in finishing and completing said works." Those provisions constituted a necessarily implied covenant by the contractor that

<sup>1</sup> Laws of Penn., June 16, 1836.

<sup>2</sup> Campbell v. Scaife, 1 Phila. 187.

no liens should be filed against the building. A sub-contractor was chargeable with notice of and was bound by all the stipulations of the original contract, and therefore was not entitled to file a lien for material furnished under his sub-contract.<sup>1</sup>

In further explanation of the theory of the law, it was held, under a statute which provided that "any person who shall actually perform labor in erecting any building by virtue of any contract with the owner thereof, or other person who had contracted with such owner for erecting such building, shall have a lien to secure the payment of the wages due," that one who had contracted with the owner to erect a building had power, by his sub-contract with another for the whole or part of the work, to create a similar lien on the estate in favor of such sub-contractor. Where, before the above statute took effect as law, the contract gave a lien to the contractor only, this was the act of the owner charging his own estate. But, under the operation of this statute, a precisely similar contract by the owner of land would give the contractor a power to bind the estate by other liens in favor of sub-contractors, for labor thereon. Such liens in favor of sub-contractors would equally bind the estate by consent of the owner, because such a contract, by force of the previous law (which gave a lien only on contract with the owner), of which the owner is presumed to be conversant, gives his irrevocable power to his contractor to charge and bind his estate; and when such power is executed by the actual making of such sub-contract for labor, it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor. When a statute is in force at the time a party does a legal act, like that of making a contract, the existing law gives force and effect to the act; he assents to and binds himself and his property to all the legal consequences of such act.<sup>2</sup> A sub-contractor's lien does not require a direct contract with the owner.<sup>3</sup> It is sufficient if the materials were furnished to a contractor with such owner or agent, for the contractor has implied authority from the owner to procure needed materials.<sup>4</sup> In South Carolina, however, where the statute requires consent of the owner or his agent as a basis of a sub-contractor's lien, one who labors for a contractor has no lien without showing such consent, and mere knowledge by the owner or his agent that the plaintiff was doing

<sup>1</sup> [Dersheimer v. Maloney, 143 Pa. 532; Schroeder v. Galland, 134 Pa. 277.]

<sup>2</sup> Donahy v. Clapp, 12 Cush. 440; Urin v. Waugh, 11 Mo. 412.

<sup>3</sup> [Reeves v. Henderson & Co., 90 Tenn. 522.]

<sup>4</sup> [Neeley v. Searight, 113 Ind. 316, 319.]

the work does not constitute such assent. The contractor does not act for the owner in employing laborers.<sup>1</sup> This seems a very narrow construction of the statute clause requiring the service to be rendered "by virtue of an agreement with, or by consent of the owner." A sub-contractor certainly does act by virtue of the original contract with the owner. The law was meant to protect laborers, and should be liberally construed to that end. In Rhode Island a sub-contractor has no lien for *materials* furnished the contractor. The lienor for materials must have a contract with or request by the owner.<sup>2</sup> In Maine the sub-contractor is protected when the law provides that "any person who shall perform labor or furnish materials shall have a lien for the same," and this although the contractor has received his pay in full from the owner.<sup>3</sup> In Washington a sub-contractor has a lien, although the owner has paid the contractor.<sup>4</sup> So in Tennessee if a sub-contractor's notice is given the owner within the statute time, his lien is not defeated by the fact that the owner has paid the contractor in full before notice.<sup>5</sup> So in Maryland holders of mechanics' liens are not restricted to the amount due to the contractor. They are not concerned with the state of the account between him and the owner. Their claim is against the building.<sup>6</sup> So in Virginia the sub-contractor has a lien regardless of the state of the accounts between owner and contractor.<sup>7</sup> So in Missouri the statute contains no clause limiting the lien of a sub-contractor to the amount due the contractor, and it is held that the lien attaches irrespective of the state of accounts between owner and contractor.<sup>8</sup> Neither is a sub-contractor's lien limited by the amount fixed by the contract between the owner and the contractor.<sup>9</sup> So where "every person, etc., shall have a lien for the work done at the instance of the owner or his agent, and every contractor shall be held to be the agent of the owner," etc., the sub-contractor's lien is not suspended until the completion of the building.<sup>10</sup> This general right of lien in favor of sub-contractors and material-men has been modified in Pennsylvania and New Jersey by more recent

<sup>1</sup> [Gray v. Walker, 16 S. C. 148; Geddes v. Bowden, 19 S. C. 1.]

<sup>2</sup> [Hatch v. Faucher, 15 R. I. 459.]

<sup>3</sup> Atwood v. Williams, 40 Me. 409.

<sup>4</sup> [Spokane Lumber, &c. Co. v. McClesney, 1 Wash. 609.]

<sup>5</sup> [Reeves v. Henderson & Co., 90 Tenn. 522.]

<sup>6</sup> [Ammendal Normal Inst. v. Anderson, 71 Md. 128.]

<sup>7</sup> [Norfolk & W. R. Co. v. Howison, 81 Va. 125.]

<sup>8</sup> [Henry v. Evans, 97 Mo. 47, 51 *et seq.*, reviewing the statutes of other States and pointing out the differences.]

<sup>9</sup> [Chilton v. Lindsay, 38 Mo. App. 57, 62. Following Henry & C. Co. v. Evans, 97 Mo. 47; overruling Henry v. Rice, 18 Mo. App. 497.]

<sup>10</sup> Quale v. Moon, 48 Cal. 478.

enactments, exempting the property from such liens when the owner records the contract, thus enabling those dealing with the contractor to inform themselves if it would be safe for them either to perform labor or furnish materials for the building. Under these statutes it has been decided, that where the law provides that "when a building is erected by contract in writing, the building and land shall be liable to the contractor alone for materials furnished, provided the contract be filed before the materials are furnished," the filing the written contract only protects the building from liens for work or materials furnished to the contractor. If the owner orders materials or employs mechanics on his own account, a lien attaches for the same.<sup>1</sup> Again, where a building was not to be responsible except to the contractor, "provided the contract is recorded within a certain period," but no book was designated in which it was to be recorded, it was held it might be recorded in a deed book.<sup>2</sup> In Oregon a sub-contractor has a lien only when the original contract is not in writing, and the contractor refuses to give the sub-contractor a memorandum of the terms of the oral contract.<sup>3</sup>

§ 58 *a*. **California Recording Act.** — A sub-contractor is not affected by a statute, making a building contract "wholly void" if not recorded before work is commenced. Failure to record affects the owner and contractor, but not material-men and laborers employed by the contractor. They had no control of the contract, and the provision is intended for their benefit, not their punishment.<sup>4</sup> They may enforce their lien in such case without reference to the amount due from the owner to the contractor, and without giving the owner any notice to withhold payment.<sup>5</sup> The statute requiring record is itself notice to the owner that he pays the contractor at his peril. In California now when the contract is not recorded there is no contract, and the decisions restricting the sub-contractor to the amount still due the contractor have no application.<sup>6</sup> *Whittier v. Hollister*, 64 Cal. 283; *O'Donnell v. Kramer*, 65 Cal. 353; *Wilson v. Barnard*, 67 Cal. 422, and *Wiggins v. Bridge*, 70 Cal. 437, holding that a sub-contractor is limited to the amount unpaid on the original contract, are all cases in which said contract was valid. Even though the material-man had actual notice of the unrecorded contract, his rights are not thereby affected. It is a

<sup>1</sup> *Mechanics' Mut. L. Ass. v. Albertson*, 23 N. J. Eq. 318.

<sup>2</sup> *Glading v. Frick*, 88 Penn. 460.

<sup>3</sup> [*Tatum v. Cherry*, 12 Ore. 135, 139, 140.]

<sup>4</sup> [*Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 197.]

<sup>5</sup> [*Kellogg v. Howes*, 81 Cal. 170; *Lumber Co. v. Gottschalk*, 81 Cal. 641.]

<sup>6</sup> [*Kellogg v. Howes*, 81 Cal. 170.]

question, not of notice but of validity of the contract, and the statute declares it wholly void if unrecorded as provided.<sup>1</sup> In such cases all liens of sub-contractors, etc., attach exactly as in cases of direct contract with the owner.<sup>2</sup> Whether the contract is recorded or not, it is the duty of the owner, on notice of the sub-contractor's claim, to withhold payment from the contractor.<sup>3</sup>

§ 59. **Lien exists, notwithstanding there are Several Contractors.**

—The right of lien thus secured is not defeated, though the contractor is such as to only a part of the building. The owner may make his contracts for different parts of the work, as with one for the stone-work, with another for the brick-work, and so on; and there is no reason why a workman or material-man employed by each contractor to do work or furnish materials within the scope of his contract should not be entitled to a lien for it, as well as if there were but one contractor for the whole building. Except in the principal cities, it is rare that men contract for the whole building.<sup>4</sup> For, it is said, if a clear legislative provision to charge the building with a lien for work and materials procured through a contractor could be defeated by making two contracts for the building instead of one, — for example, one contract for the masonry and another for the carpentry, — the provision in the statute is worthless. It could always be evaded. What difference is there in principle when different men become contractors for the erection of the building in divisions? Certainly there is none. Within the division committed to each, the owner, by his contract with him for construction of that division, commits his authority to bind the building just as fully and as equitably as he could to one person for the whole erection. And where the law classes the contractor in the same category as architect and builder, he becomes as much the agent of the owner as the others; and the lien of the persons providing labor or materials on his order is as secure as if he had been termed an architect or builder.<sup>5</sup> So a marble-mason, contracting with the owner for all the marble mantels in a building, is a "contractor" under this lien law, and as such can render the building liable to the lien of a person who, at his request, furnished and put up one set.<sup>6</sup>

§ 60. **Right of Sub-contractor in Second Degree.** — This right of the contractor to pledge the building for debts to sub-contractors

<sup>1</sup> [Kellogg v. Howes, 81 Cal. 170.]

<sup>2</sup> [Lumber Co. v. Gottschalk, 81 Cal. 642.]

<sup>3</sup> [Russ Lumber, &c. Co. v. Garrettsou, 87 Cal. 589, 594.]

<sup>4</sup> Singerly v. Doerr, 62 Penn. 9.

<sup>5</sup> Duff v. Hoffman, 63 Penn. 191.

<sup>6</sup> Derrickson v. Nagle, 2 Phila. 120.

and material-men has not been extended by construction to sub-contractors, except upon express statutory enactment. Under a law giving a lien to "sub-contractors," a sub-contractor of a sub-contractor cannot maintain a lien.<sup>1</sup> But a laborer for either a contractor or a sub-contractor may.<sup>2</sup> A sub-contractor in the second degree, that is, one supplying a sub-contractor, is not entitled to serve notice on the owner and claim funds in his hands due the contractor. "The persons intended to be benefited by the third section of the lien law are the persons who have a right to demand payment from that contractor with whom the owner has an account." The contrary construction would bring disastrous consequences.<sup>3</sup> As where the law provides that "every building shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection of the same," while it authorizes contractors to create liens for building, it does not authorize sub-contractors to do the same. When the owner employs a house-builder to erect a house for him, the parties are directly connected by contract, and the lien must be founded on it. It is never intended in such a case that the builder shall himself find all the materials and do all the work by his own hands; and therefore the law implies an authority in him to bind the building to others for the materials which he may procure from them, and also in some cases for work specially done by others. Yet he cannot bind it to the journeymen and laborers, whom he is always presumed to employ, not only for such work, but for all the work in their respective occupations for which their employer may need them. They are not considered as working on the credit of the building, but on the faith of their employer. The law implies that the contractor for the whole work may get materials and contract with special artisans, required for the different parts of the work, on the credit of the building. There is no policy that would extend its construction to this latter class. If such were the case, the multiplication of liens would become an intolerable nuisance, by allowing distant sub-contractors to thus encumber property. It would be intolerable, not only to persons having houses built, but to mechanics themselves; for no prudent man would, with such a law, venture to employ any but rich mechanics about his building, without getting security

<sup>1</sup> [Monroe v. Hannan, 18 Dist. Colum. 197.]

<sup>3</sup> [Carlisle v. Knapp, 51 N. J. L. 329, 331.]

<sup>2</sup> [Spalding v. Dodge, 6 Mackey (D. C.) 289, 294.]



against liens, which they might multiply with so much facility. How distant, then, may the claimant stand from the contract between the owner and builder before there is no lien? Certainly there must be a limit somewhere. The carpenter may undertake with the builder for finishing all his kind of work, including all the nails, screws, etc. Can he transmit the right of lien to all dealers and artisans in these kinds of business? If he can, then the lien rights against any house may be entirely indefinite. The bricklayer, the stone-mason, etc., may multiply them in the same way, until the costs of liens may exceed the value of the house. What, then, is the limit of these lien rights? The law must answer. And when it provides, in connection with the section immediately above quoted, that "every claim must set forth the names of the party claimant, and of the owner or reputed owner of the building, and also of the contractor, architect, or builder, where the contract of the claimant was made with such contractor, architect, or builder," the law establishes one link, and only one, between the owner on the one hand and the workman and material-man on the other. It requires the lien to be founded on contract; and it recognizes no one as having power to contract so as to make a lien against the building, except the owner and the contractor or architect. And this limit is perfectly clear and reasonable. It leaves to the owner a reasonable control in relation to the liens with which his house may be encumbered, and prevents their indefinite multiplication by others who are under no contract relation with him, and who might therefore create liens at their pleasure and against his will. It requires of claimants of liens to have regard, not merely to their own interest, but to that of the owner, in making their contracts with third persons, and to see that the person contracting with them has authority to bind another person's property for the work or materials which are wanted for them. The owner, and the contractor under him, alone have power to bind the building under such a statute.<sup>1</sup> In another case before the same court, and under the same statute, a journeyman mechanic, even when employed in working on a building under the original contractor or master-mason, could not file a lien against the erection; the court observing that, were they allowed liens, then every individual workman engaged by the principal, even for a day, might add his lien to those of the contractor and sub-contractor. This would soon be felt as intoler-

<sup>1</sup> *Harland v. Rand*, 27 Penn. 511; *Singerly v. Doerr*, 62 Penn. 9.

able. To increase the risks so materially as to extend them to journeymen would be seriously to interfere with the growth and improvement of our cities and towns, by interposing obstacles to the march of meritorious enterprise, and thus eventually to injure the workman himself. For the introduction of such a rule a distinct manifestation of legislative will is necessary. It is far better for all parties to leave the journeyman operative to the security he most commonly relies on, the personal responsibility of his employer.<sup>1</sup> So where a party, as a mere agent, was employed to superintend the work, and to hire men by the day or otherwise to do it, he is in no proper sense of the word a contractor; and work done under his order is chargeable to the contractor individually, and not to the owner.<sup>2</sup>

§ 61. **When Lien of Sub-contractor is confined to Amount due by Owner at Time of Notice.**<sup>3</sup>—The system most generally adopted for the security of sub-contractors and material-men is that which confines their right of recovery to the amount due the contractor by the owner at the time of notice to the latter. This remedy is in the nature of an attachment or garnishment, dating from notice like ordinary attachments; as where, "on being served with a notice by a sub-contractor, the owner of such building shall withhold from the contractor, out of the first moneys due," etc.<sup>4</sup> Where a statute provided that a material-man might give the owner notice of his claim, and "such notice shall subject any unpaid balance in the hands of the owner to the payment of such claim, and shall be a lien, etc., to that extent, etc., of such unpaid balance and no more," held, imperative on a material-man who had furnished supplies where no amount was due by owner to contractor.<sup>5</sup> So in California, one who furnishes materials to a contractor can only hold the owner for the amount due from him to the contractor on the contract, in the aid of which the materials are furnished.<sup>6</sup> So if the proceedings by a sub-contractor are to be by "writ of garnishment" against the owner, they are to be conducted as an ordinary garnishment.<sup>7</sup> Notice by a workman or material-man, given pursuant to law, operates as an assignment of the debt due from the owner to the contractor, under the contract, to the extent of the

<sup>1</sup> *Jobsen v. Boden*, 8 Barr, 463.

<sup>2</sup> *Snyder v. Gibbons*, 3 Phila. 126.

<sup>3</sup> [See § 205 *et seq.*]

<sup>4</sup> *Cahoon v. Levy*, 6 Cal. 295; *McAlpin v. Duncan*, 16 Cal. 127; [*Turner v. Streunzel*, 70 Cal. 28;] *Geiger v. Hussey*, 63 Ala. 338; [*Childers v. Greenville*, 69 Ala. 103; *Pitt v. Acosta*, 18 Fla. 270, 280.]

<sup>5</sup> [*Childers v. City of Greenville*, 69 Ala. 103; *Phillips*, §§ 12, 112; cited with approbation, *Willingham v. Long*, 70 Ala. 587.]

<sup>6</sup> [*Turner v. Strenzel*, 70 Cal. 28.]

<sup>7</sup> *Parmenter v. Childs*, 12 Iowa, 26.

amount due from the contractor to the workman or materialman. This notice gives him a right of action against the owner, if he improperly refuses to pay, and further a court of equity will stay the execution of a judgment by a contractor against the owner, and order the money to be paid into court for the benefit of those entitled.<sup>1</sup> A person, to be in a position to impound money in the hands of the owner, for his benefit, by notice, under the third section of the New Jersey mechanics' lien law, must be a creditor of the contractor for work done or material furnished for the building; his debt must be *due*, and he must have demanded payment of the contractor of a sum which the contractor is obliged to pay at once. Under a building contract containing a clause that the work shall be done under the direction and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand, no right to the money earned under the contract accrues, and no action can be maintained to recover it, until the certificate is procured or the contractor is entitled to it.<sup>2</sup> Money due a contractor, which has been reserved by the owner to pay liens of sub-contractors, is not subject to trustee process in a proceeding against the contractor.<sup>3</sup> In New York it is provided that "any person who, in pursuance of an agreement with any contractor of the owner, shall, in conformity with the terms of such contract, perform any labor or furnish materials in building, etc., shall, upon filing the notice, etc., have a lien for the value of such labor, etc., to the extent of the right, title, and interest existing of such owner; but such owner shall not be obliged to pay for, or on account of, such house, etc., any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract." The settled construction of this law is, that, except in cases of fraud, the owner cannot, under any of its provisions, be compelled to pay any greater sum for the completion of a building than by his contract he agreed to pay. The effect of the statute is simply to take from the owner money actually owing by him upon his contract, and apply it in payment for the labor and materials which sub-contractors or materialmen have contributed towards the performance of the same contract.<sup>4</sup> And where the law declares that no transfer or assignment of his interest in the contract by the contractor shall be valid against parties entitled to file liens under said contract

<sup>1</sup> Wightman v. Brenner, 26 N. J. Eq. 489.

<sup>3</sup> Hitchcock v. Laneto, 127 Mass. 514.

<sup>4</sup> Ferguson v. Burk, 4 E. D. Smith (N. Y.), 760, and many cases cited.

<sup>2</sup> [Kirtland v. Moore, 40 N. J. E. 106.]

against said contractors, it operates as an equitable transfer to a lienor of the money due to the contractor by the owner at the time of filing his lien claim, against which nothing should prevail except that which springs out of the contract itself, such as omissions or violations of its obligations, affecting its performance and consequently the amount due to the contractor.<sup>1</sup> A contractor's order on the owner is an equitable assignment *pro tanto* of what is due him, but he cannot pay in advance out of the fund in the hands of the owner a sum in excess of the amount due for materials and labor, except subject to the operation of the lien law.<sup>2</sup> Verbal notice to the owner of a house that the contractor had verbally transferred to a material-man an amount of the contract price equal to the claim of the latter, withdraws that amount if due from the further control of the owner.<sup>3</sup> But an assignment by the contractor of the amount to become due him with notice to the owner does not affect the lien of a sub-contractor.<sup>4</sup> In a law providing that the aggregate amount of liens "must not exceed the amount which the owner would be otherwise liable to pay at the time of the filing of the claim," it does not necessarily mean a liability which can then be enforced, but means liability to pay by virtue of, and according to the terms of the contract, either presently or *in futuro*. The clause was intended to limit the owner's liability in the aggregate to the amount which he has contracted to pay, deducting payments made before the filing of the lien.<sup>5</sup> Under the laws of New York, 1870, where nothing is due a contractor at the time the notices of sub-contractors are filed, there is no lien against the owner.<sup>6</sup> But here again the liability of the owner is not necessarily a liability which could be enforced at the time the lien was filed. The debt to the contractor may accrue afterward, and be held by the sub-contractor's lien.<sup>7</sup> The clause "due or to become due under the contract," § 1657, General Laws, Colorado, 1877, entitles the sub-contractor to payment out of funds becoming due the contractor, for labor or materials furnished after the claimant's lien notice, but under the same principal contract.<sup>8</sup> If the owner pays the contractor without requiring from him a statement of amounts due sub-

<sup>1</sup> Develin v. Mack, 2 Daly (N. Y.), 94; Mandeville v. Reed, 13 Abb. Pr. (N. Y.) 173; Whittier v. Wilbur, 48 Cal. 175.

<sup>2</sup> [Stevens v. Reynolds, 54 Hun, 419.]

<sup>3</sup> [Clark v. Gillespie, 70 Tex. 513.]

<sup>4</sup> [Bourget v. Donaldson, 83 Mich. 478.]

<sup>5</sup> Heckmann v. Pinkney, 81 N. Y. 211; Weeks v. Little, 47 N. Y. Super. Ct. 1.

<sup>6</sup> Sampson v. Buffalo, 20 N. Y. Sup. Ct. 280.

<sup>7</sup> [Van Clief v. Van Vechten, 55 Hun, 467.]

<sup>8</sup> [Tabor v. Armstrong, 9 Colo. 285, 287.]

contractors as provided by law, the sub-contractor can hold the owner beyond the amount due the contractor.<sup>1</sup> One who furnishes materials to a sub-contractor has no greater rights than the sub-contractor, and cannot claim against the owner more than the amount due from the owner to the original contractor.<sup>2</sup> A sub-contractor filing his claim after the thirty days have expired may claim what is still due the contractor but no more.<sup>3</sup>

§ 62. **Lien of Sub-contractor subordinate to Owner's Contract.**<sup>4</sup>—The lien or right of the sub-contractor and others, discussed in the preceding section, is always in strict subordination to the terms of the original contract between the owner and his immediate contractor.<sup>5</sup> All such persons, in the absence of fraud, are presumed to have notice of the existence of such contract, a knowledge of its terms, and of the rights and obligations of parties thereunder. Its terms are conclusive against them so far as any claim upon the owner, or right of lien upon his premises, is concerned.<sup>6</sup> Under a statute which provides that "the owner shall not be obliged to pay for his building, in consideration of all the liens, any greater sum than the price stipulated in the contract," unless he shall make payments by collusion, or in advance of the terms of the contract, the legal effect of these provisions is to subrogate sub-contractors *pro tanto* to the rights of the contractor.<sup>7</sup> This law only subrogates the sub-contractor *pro tanto* to the rights of the contractor, under the contract, and he can, except in case of fraud, collusion, or intent to evade the act, have no other or greater rights.<sup>8</sup> Under a similar statute, where a sub-contractor may give notice to the owner of his demand and the latter is to retain what may be due the contractor, the rights of a sub-contractor to payment from the owner under such a statute are in strict conformity and dependence upon the original contract between owner and contractor.<sup>9</sup> If the contract was that a note should be given payable six months after the building's completion, the sub-contractor cannot maintain suit to enforce his lien until the six months' term of credit expires.<sup>10</sup> If the contract requires a certificate from the architect before each instalment shall be due, a mechanics' lien can-

<sup>1</sup> [Conklin v. Plant, 34 Ill. App. 264.]

<sup>2</sup> [Whittier v. Hollister, 64 Cal. 283; O'Donnell v. Kramer, 65 Cal. 353.]

<sup>3</sup> [Ewing v. Folsom, 67 Iowa, 65.]

<sup>4</sup> This section is cited with approbation in McIntire v. Barnes, 4 Colo. 288.

<sup>5</sup> Dingley v. Greene, 54 Cal. 333; [Roy-lance v. San Luis Hotel Co., 74 Cal. 273, 277.]

<sup>6</sup> Henley v. Wadsworth, 38 Cal. 356.

<sup>7</sup> Post v. Campbell, 25 N. Y. Sup. Ct.

51. <sup>8</sup> Herbert v. Herbert, 57 How. Pr. (N. Y.) 333.

<sup>9</sup> Reeve v. Elmendorf, 38 N. J. L. 125.

<sup>10</sup> [Pitt v. Acosta, 18 Fla. 270, 280.]

not be maintained without alleging and proving that such certificate was issued, or that the architect refused to issue it.<sup>1</sup> So in Louisiana, a sub-contractor or material-man supplying the contractor has against the owner only the rights of the contractor. If the latter has failed to record his contract or otherwise omitted anything necessary to preserve it, his creditors have no lien, and when they have a lien it is only to the amount due the contractor.<sup>2</sup> A sub-contractor doing extra work by verbal direction of certain members of the building committee cannot claim therefor when the principal contract provides that no charge for extra work shall be allowed except on estimates and certificate of building committee.<sup>3</sup> A sub-contractor must take notice that the original contract is completed, and can have no lien under it, for work subsequently done by direction of the contractor.<sup>4</sup> In such cases the rights of sub-contractors are subject to all equities between the owners and contractors,<sup>5</sup> and cannot exceed the original contract price between the owner and contractor.<sup>6</sup> But where the contractor has failed to fulfil his contract, a sub-contractor claiming a lien for materials furnished before the contractor's breach need not set out the terms of the original contract nor allege that anything is due the contractor.<sup>7</sup> And while a sub-contractor is presumed to know the original agreement between owner and contractor, yet a subsequent agreement between them cannot be set up to his prejudice.<sup>8</sup> There is no constitutional objection to a statute securing a lien to material-men, who, at the instance of a contractor, furnish him with the materials which are used in the construction of the building, provided the aggregate liens do not exceed the contract price, as fixed by the owner and contractor.<sup>9</sup> A sub-contractor's lien may be enforced irrespective of the state of accounts between the owner and contractor, but it is limited by the original contract price, and by the reasonable value of the labor or materials, though less than the sub-contract price.<sup>10</sup> The owner may avoid the liens of sub-contractors by posting a notice that he will not be responsible.<sup>11</sup>

§ 62 *a*. **When Sub-contractor's Notice operates as a Lien.**—Whether the notice of the sub-contractor and material-man shall

<sup>1</sup> [Wolf v. Mchaelis, 27 Ill. App. 336 ; 33 id. 645.]

<sup>2</sup> [Schwartz v. Cronan, 30 La. An. 993, 1000, 1001.]

<sup>3</sup> [Shaw v. Church, 44 Minn. 22. See § 62 *f*, extra work.]

<sup>4</sup> [Scott v. Cook, 8 Mo. App. 193, 196.]

<sup>6</sup> Morgan v. Stevens, 6 Abb. (N. Y.) N. Cas. 356.

<sup>6</sup> Trustees Wyllly Academy v. Sanford, 17 Fla. 162.

<sup>7</sup> [Doyle v. Munster, 27 Ill. App. 130.]

<sup>8</sup> [Shaw v. Stewart, 43 Kans. 572, 579.]

<sup>9</sup> Whittier v. Wilbur, 48 Cal. 175.

[See § 33 *a*.]

<sup>10</sup> [Laird v. Moonan, 32 Minn. 358.]

<sup>11</sup> [Spokane Lumber, &c. Co. v. McChesney, 1 Wash. 609.]

operate as a lien on the property of the owner, or simply confer a right of action against him for the unpaid balance due the original contractor, depends entirely on the provision of statutes. In New York, for example, it is provided that "any person who, in pursuance of an agreement with any contractor of the owner, shall, in conformity with the terms of such contract, perform any labor or furnish materials in building, etc., shall, upon filing the notice, etc., have a *lien* for the value of such labor, etc., to the extent of the right, title, and interest existing of such owner; but such owner shall not be obliged to pay for or on account of such house, etc., any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract." Other States have not secured this right by a lien upon the estate, but only by a personal action against the owner. As where "any sub-contractor, journeyman, or laborer employed in the construction or repair of, or furnishing materials for, any building, may give to the owner thereof notice in writing, particularly setting forth the amount of his claim, etc., and that he holds the owner responsible for the same; and the owner shall be liable for such claim, but not to exceed the amount which may be due, etc., from him to the employer, which may be recovered in an action," etc., this law has no reference whatever to the subject of liens. It simply provides for fixing a personal liability upon the owner of a building under certain circumstances and to a certain extent;<sup>1</sup> and a party is entitled to pursue the remedy provided by the above section, although he may also have taken the steps necessary to create a lien on the premises.<sup>2</sup> So, although a State constitution provided that "mechanics, artisans, and material-men, of every class, shall have a lien upon the buildings, for the value of their labor or materials," and the legislature only provided that the sub-contractor might have, after notice, a right of personal action against the owner for the unpaid balance, it was held that the sub-contractor had no lien on the building.<sup>3</sup> Again, where the remedy given a sub-contractor against the owner, for money due to a contractor, is "money had and received," it is exclusive and there is no lien.<sup>4</sup> Nor does the sub-contractor acquire any general right to the whole fund in the owner's hands. It only amounts to a specific appropriation of a part sufficient to pay his

<sup>1</sup> *Barker v. Buell*, 35 Ind. 297; *Raleigh v. Tossett*, 36 Ind. 295; *O'Halloran v. Leachy*, 39 Ind. 150.

<sup>2</sup> *O'Halloran v. Leachy*, 39 Ind. 150.

<sup>3</sup> *Horan v. Frank*, 51 Tex. 401; *Loonie*

*v. Frank*, id. 406; *Pool v. Sanford*, 52 Tex. 621; *Sens v. Trentune*, 54 Tex. 218.

<sup>4</sup> *Dunn v. Kanmacker*, 26 Ohio, 497.

account. The owner may pay over the balance to the original contractor.<sup>1</sup> In California, on notice of a sub-contractor's claim, it becomes the duty of the owner to withhold the unpaid balance due or to become due to the contractor. This right is in the nature of a garnishment, and does not depend on the existence of a lien, for it applies to workmen on a public building as well as upon private structures.<sup>2</sup> So in New Jersey, when a notice is given to an owner under the law, he must hold, of any moneys which are then due, or which may thereafter become due to the contractor upon the contract, a sufficient amount to answer the notice.<sup>3</sup>

§ 62 *b*. **Right of Owner to pay Contractor until Notice is given.** — Unless there is some provision of the statute to the contrary, an owner may make payments due by the tenor of his contract, before notice is received. Sub-contractors are usually required to take notice of the terms of the principal contract, and the owner is protected in making payments to the principal contractor in accordance with the terms of his contract, unless notified of claims for materials before such payments are due.<sup>4</sup> *Actual* notice, however, is sufficient, though the claim is not filed.<sup>5</sup> Under a lien law which does not give a sub-contractor any lien upon the moneys due or to become due to the contractor from the owner, but authorizes the sub-contractor to give notice to the owner, who shall then hold the moneys due the contractor for the benefit of the sub-contractor, until notice is given, the contractor is left at full liberty to dispose of the moneys secured to him by contract as he sees fit. The right of the workman or material-man does not attach until notice is given. If, when the notice comes, there is nothing due the contractor, in consequence of a previous assignment of the debt, the right of the sub-contractor does not attach.<sup>6</sup> Again, where sub-contractors file a mechanics' lien against the property of the owner, for work done and materials furnished to the original contractors, and the owner settles in full with the latter without notice of any claim of the sub-contractors, such sub-contractors have no lien.<sup>7</sup> Where a lien is given "whether labor is done at the instance of the owner or his agent; and every contractor shall

<sup>1</sup> McCullom v. Richardson, 2 Handy (Cin.), 274.

<sup>2</sup> [Bates v. Santa Barbara Co., 90 Cal. 543, 546.]

<sup>3</sup> [Mayer v. Mutchler, 50 N. J. L. 162; Budd v. Trustees, 51 N. J. L. 36.]

<sup>4</sup> Stewart v. Wright, 52 Iowa, 335; [Roland v. Centerville, &c. R. Co., 61

Iowa, 380; Nash v. Chicago, &c. R. Co., 62 Iowa, 49, 50; Andrews v. Burdick, 62 Iowa, 714; Martin v. Morgan, 64 Iowa, 270, 271. See next section.]

<sup>5</sup> [Andrews v. Burdick, 62 Iowa, 714.]

<sup>6</sup> Craig v. Smith, 37 N. J. L. 549; Reeve v. Elmendorf, 38 N. J. L. 125.

<sup>7</sup> Guernsey v. Reeves, 58 Ga. 290.



be held to be the agent of the owner," notwithstanding the broad language of the statute, where the owner has made payments to the contractor in good faith and in pursuance of the contract, before receiving notice, either actual or constructive, of the liens, the sub-contractor could not charge the building with a lien exceeding the balance of the contract price remaining unpaid when the notice of the lien was given.<sup>1</sup> The amendments to the California Civil Code of 1874 did not alter the rule in the last preceding citation.<sup>2</sup>

§ 62 *c.* **Payments made in Accordance with Contract, but in Advance of Expiration of Sub-contractor's Right to give Notice.** — In order to prevent fraud upon sub-contractors by the owner and contractor stipulating for payments which were in advance of the value of work done, some States have given sub-contractors and material-men a certain period in which to give notice to the owner of their unpaid claims. Some authorities hold that, until this period expires, the owner cannot with safety pay the contractor, although the money may be due by the terms of the contract. Thus, where a sub-contractor has twenty days in which to give notice to the owner of his claim, all payments made by the owner within that time to the contractor will be regarded as having been improperly made, if made to the prejudice of the interests of the sub-contractor, and will not defeat the latter's rights.<sup>3</sup> So, "if the contractor does not pay such sub-contractor for the same, such sub-contractor shall have a lien for the amount due, as such original contractor," etc., and the risk of all payments made to the original contractor shall be upon the owner until the expiration of sixty days," etc., it was held that where the owner entered into a contract by which the contractor agreed to build a house for \$1,300, — \$800 of which was paid on the execution of the contract, and the balance after completion, — a sub-contractor had, notwithstanding, a lien for \$900 due for materials furnished the contractor, the object of such law being to prevent the cutting off of the liens of sub-contractors by early payments to the contractor.<sup>4</sup> While it is true the owner may make such a contract as he sees proper, and the sub-contractor is bound thereby, yet if the contract recognizes there may be sub-contractors whom the owner may be required to pay, and such owner has knowledge that there are such sub-contractors, he cannot pay the contractor with impu-

<sup>1</sup> *Renton v. Conley*, 49 Cal. 188.

<sup>2</sup> *Wells v. Cahn*, 51 Cal. 423.

<sup>3</sup> *Havighorst v. Lindberg*, 67 Ill. 463.

<sup>4</sup> *Shellabarger v. Thayer*, 15 Kan. 619;  
*Delahay v. Goldie*, 17 Kan. 263.

nity during the period in which the sub-contractor may file his lien.<sup>1</sup> Again, where a lien is given to a material-man furnishing materials to a contractor, which lien is to "relate to the time when the work upon said building began, and to the time when the person furnishing materials began to furnish the same," such lien, if the notice is filed within the time limited by the statute, is not defeated by the fact that the owner, before the filing of the notice of intention to hold the lien, has paid the contractor in full for the work and materials.<sup>2</sup> If the owner knows that C. is furnishing materials he pays the contractor within thirty days at his peril.<sup>3</sup> Actual knowledge of facts sufficient to put the owner on inquiry is enough without service of notice by the sub-contractor.<sup>4</sup> In such cases the owner must withhold payment from the contractor, wait till the various sub-contractors have filed their liens and pay them in the order of their priority, and the owner is not justified in paying some sub-contractors to the detriment of the rest, even though the payment is made in accordance with a previous understanding with the sub-contractors who are thus paid.<sup>5</sup> In *Lumber Company v. Osborn*<sup>6</sup> the court said that *Gilchrist v. Anderson* and *Winter v. Hudson* turned on the fact that the owner had reserved a right to pay sub-contractors, and that where that is not the case, he may pay the contractor in accordance with the terms of the contract, although he knows that the contractor has obtained materials of some one. The state of the account between the owner and contractor is immaterial. Within the sixty days given for filing the lien the owner pays the contractor at his peril, and the fact that the contractor is indebted to the owner will not prevent the sub-contractor's lien from attaching.<sup>7</sup> Again, if "sub-contractors have a lien regardless of the claims of the contractor against the owner, but if any money be due or is to become due under the contract from said owner to said contractor, on being served with notice by a sub-contractor said owner may withhold out of the first money due, or to become due, under the contract, a sufficient sum to cover the lien," it was held to give sub-con-

<sup>1</sup> *Winter v. Hudson*, 54 Iowa, 339; [*Fay v. Orison*, 60 Iowa, 136; see last section; *Jones & M. Lumber Co. v. Murphy*, 64 Iowa, 165, 169.]

<sup>2</sup> *Barker v. Buell*, 35 Ind. 297; *Colter v. Frese*, 45 Iowa, 96; *City of Crawfordville v. Johnson*, 51 Iowa, 397.

<sup>3</sup> [*Hug v. Hintrager*, 80 Iowa, 359, 364, nothing said about owner's contract giving

him a right to pay liens; *Lumber Co. v. Woodside*, 71 Iowa, 359.]

<sup>4</sup> [*Gilchrist v. Anderson*, 59 Iowa, 274; *Othmer Bros. v. Clifton*, 69 Iowa, 656; compare § 338.]

<sup>5</sup> [*Othmer Bros. v. Clifton*, 69 Iowa, 657; *Lumber Co. v. Woodside*, 71 Iowa, 359.]

<sup>6</sup> [72 Iowa, 472, 474; *Adams, C. J.*, dissenting.]

<sup>7</sup> [*Ballou v. Black*, 21 Neb. 131, 147.]

tractors direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract, made prior to the time within which the law requires notice of their claims to be recorded.<sup>1</sup> On the other hand, however, under a law that gave sub-contractors a lien for their labor or materials, but provided that the aggregate of all liens should not exceed the original contract price, and further that "no person shall have a lien unless such person shall within thirty days after the term of his employment has expired, or after delivery of materials, give notice in writing to the owner," it was held that where the owner pays the contractor in pursuance of the obligation of his original contract after its completion, a sub-contractor acquires no lien by his notice, although the notice was given within the thirty days; on the ground that the sub-contractor is bound to ascertain the precise character of the original contract, and that at his own peril he must guard against payments provided by the contract to be made by the owner, and his notice be given accordingly.<sup>2</sup> Again, although a statute declares that "all mechanics and others shall have and may claim and hold a lien upon such building," and that "when such lien is claimed by a sub-contractor, the statement shall be filed within twenty days," and gives to "every sub-contractor a lien upon the superstructure; and if money be due, or is to become due, under the contract from the owner, upon the service of notice of claim of lien the owner may withhold a sufficient amount to satisfy the lien claimed," still a sub-contractor cannot maintain a lien thereunder, unless at the date of notice to the owner there was something due, or to grow due, to the contractor.<sup>3</sup> If the defendant in good faith paid the contractor in full, without knowledge of the plaintiff's demand, and the money so paid went to the satisfaction of claims for work done and material furnished on the building, it is, in legal effect the same as if the defendant had paid the contract money directly for the work and materials to the subordinates, and her property cannot be subjected to the plaintiffs' demand for the excess.<sup>4</sup> But a defendant owner's offer to show that he had paid out to sub-contractors, material-men, and mechanics more than the contract price of the building, unaccompanied by any claim that the payments were compulsory, or were made in good faith without

<sup>1</sup> *Hunter v. Truckee Lodge*, 14 Nev. 24; *Lonkey v. Cook*, 15 Nev. 58.

<sup>2</sup> *Jensen v. Brown*, 2 Col. 694; *McIntyre v. Barnes*, 4 Colo. 288.

<sup>3</sup> *McKnight Bros. v. Washington*, 8 W. Va. 666; *Stout's Adm'r v. Golden*, 9 W. Va. 231.

<sup>4</sup> [*Henry v. Rice*, 18 Mo. App. 497, 515; *Garnett v. Berry*, 3 Mo. App. 205.]

notice of the plaintiff's demand, was properly refused by the trial court.<sup>1</sup> If the contractor receives payment in full according to the terms of the contract, before the sub-contract is made, the sub-contractor has no lien.<sup>2</sup>

§ 62 *d.* **Right of Owner and Contractor to modify Contract.** — There is a contrariety of opinion as to whether the owner and contractor have the right to change the terms of the contract which existed between them when others became sub-contractors, without the consent and to the prejudice of the latter. Thus, where a statute requires a written contract, and gives the contractor a lien which shall "enure primarily to the benefit of all persons who, as employees of the original contractor, should perform work," etc., it is assumed in the theory of this act that tradesmen before furnishing materials to the contractor, and laborers before entering his service, will inform themselves as to whether a written contract has been made, and if so, then that they will, by inspection or otherwise, ascertain its provisions; and if they conclude to deal with the contractor, the one supplying him with materials and the other with labor, they are presumed to do so on the faith of the original contract to which they may have access. It follows that no agreement subsequently made between the principal parties, unless reasonably disclosed to the workmen, can be set up to their disadvantage.<sup>3</sup> So, the rights of sub-contractors are not affected by agreement between contractor and owner, made after notice from the former.<sup>4</sup> In New York, on the other hand, it has been held that the owner deals with the contractor only, and, for the mutual interest of both, should be at liberty to modify the agreement between them in any way, so long as no rights of other parties intervene, or are brought to notice.<sup>5</sup>

§ 62 *e.* **Privity of Contract.** — Where the law contemplates that there must be an active, subsisting contract between the builder and owner before the latter can be made responsible for materials furnished to the former, if the contract between the owner and the builder was, in point of fact, at an end at the time the materials are furnished, the material-man can gain no lien; nor will materials furnished after the end of the contract give to the material-man the right to claim a lien for materials which he has lost by delay in notifying the owner, according to the stat-

<sup>1</sup> [Shroeder v. Mueller, 33 Mo. App. 28.]

<sup>4</sup> Brown v. Lowell, 79 Ill. 484.

<sup>2</sup> [Mallory v. Marion Water Works Co., 77 Iowa, 715.]

<sup>5</sup> Post v. Campbell, 25 N. Y. Supr. Ct. 51.

<sup>3</sup> Davis v. Livingston, 29 Cal. 283.

ute. No formal notice is necessary to be given, to those furnishing materials to the contractor, of the termination of the contract, provided *bona fide* and in fact it is at an end. The party furnishing the materials has the duty imposed upon him by the law—which was designed mainly, if not exclusively, for his benefit—of seeing that he is dealing with the person who is actually the builder or contractor at the time the materials are furnished. If the materials were furnished by virtue of an express authority or direction of the owner of the building, there would be some reason for requiring some notice equally express, revoking the authority or direction. But where the authority to charge and bind the owner alone results from the contract between him and the builder, that authority must be taken as having ceased as soon as the contract ceases. If it were otherwise, there would be no protection for the owners of buildings against the acts of improvident and fraudulent contractors. It is hardly to be presumed that the law imposes upon the owner of a building the necessity of giving public notice, through the papers, of the termination of the contract of the builder, in order to protect himself against the acts of the latter; nor can it be contended that individual or personal notice to each material-man or sub-contractor is required, because in many cases it would be impossible for the owner to know who they were. But for the owner to protect himself against any misconduct on the part of the builder, it is necessary that the owner should have objected, if he knew of it, to the delivery of materials or performance of work, and not have allowed them to be used in his building.<sup>1</sup> In another case, it was said that the right to enforce a lien against the property of the owner, in favor of a sub-contractor or material-man, is not founded upon privity of contract with the owner, but rests solely upon statutory law. But if the houses are finished, and the contract between owner and contractor is at an end, and the relation of contractor and owner did not exist at the time of the delivery of materials, then such delivery could not in any manner affect the owner. This question is to be submitted to the jury.<sup>2</sup> Where a lien is given a sub-contractor for what may be due from the owner to the contractor, a sub-contractor of a sub-contractor, who has been paid in full, cannot enforce a lien against the owner for money due the contractor.<sup>3</sup> So, one who has furnished materials under a contract with a sub-contractor for a portion of the work can

<sup>1</sup> Greenway v. Turner, 4 Md. 296.

<sup>2</sup> Treusch v. Shryock, 51 Md. 162.

<sup>3</sup> Utter v. Crane, 37 Iowa, 631.

acquire no lien therefor against the owner by filing notice after the contractor has paid the sub-contractor, although the owner is indebted to the contractor. It is only to the extent of what is due, or to become due, to the sub-contractor upon his contract that the lien can attach.<sup>1</sup>

§ 62.*f.* **Right of Sub-contractor confined to Contract out of which his Claim arises.**—Where any person performing “any work . . . toward the erection of any house . . . erected under a contract between the owner thereof and builder, . . . whose demands have not been paid, may deliver to the owner of such building an account, . . . and the owner shall retain,” etc., it was held that the claim of sub-contractor against the owner of the structure is limited to the work, etc., furnished in performing a particular contract in relation to such structure; also to the amount unpaid on such contract. Where independent jobs are let under separate contracts, though between the same owner and contractor, the liens of sub-contractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform. When a contract provides for changes, and extra work is done in completing the structure without a new contract, a sub-contractor of any part of the job may proceed for the amount due for the extra work.<sup>2</sup> So, where extra work consists of, and is a part of, the completion of the original contract, any additional amount due from the owners to the contractor in consequence thereof may be reached by the sub-contractors, in the same manner as if it became due under the terms of the original contract, although they did not specially contribute towards it.<sup>3</sup> Where a sub-contractor's contract requires that all extra work shall be first agreed upon in writing by the superintendent and the principal contractor, the sub-contractor will be entitled to compensation nevertheless for extra work made necessary by a change of plans and dimensions without his knowledge until after the work was done, and when the principal contractor has absconded and the superintendent refuses to give any writing.<sup>4</sup> Where the original contract provided for the doing of extra work, the items for such are properly included in the account made under the original contract, and do not require separate contracts.<sup>5</sup> A provision in a sub-contract that fifteen per cent of the price is reserved until

<sup>1</sup> *Lumbard v. Syracuse*, 55 N. Y. 491;  
*Crane v. Genin*, 60 N. Y. 127; *Drake v.*  
*O'Donnell*, 49 How. Pr. (N. Y.) 25.

<sup>2</sup> *Dunn v. Rankin*, 27 Ohio, 132.  
[See § 62.]

<sup>3</sup> *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y.) 356.

<sup>4</sup> *Fitzgerald v. Beers*, 31 Mo. App.

<sup>5</sup> *Pullis v. Hoffman*, 28 Mo. App. 666.]

completion of the contract, and that all payments might be refused until the sub-contractor presents full releases of claims and liens of laborers and material-men, does not prevent the contractor from using the reserve if necessary to secure completion of the work. The provision is for the contractor's benefit, and one who loans money to the sub-contractor taking an assignment of the reserved fifteen per cent, cannot require the contractor (on notifying him of the assignment) to keep the reserve.<sup>1</sup>

§ 62 *g*. **Performance of Contract.** — The authorities seem to be unanimous, that where the extent of the owner's obligation to pay is limited to the price stipulated in his contract, the sub-contractor's right is confined to what may be due the contractor after the completion of the contract. The following decisions have been made illustrating this subject: Where subsidiary contractors are entitled to a lien only within the limits of the price as fixed by the contract between the owner and the original contractor, the performance of the work is a condition precedent. If the contract is an entirety, no liens can be filed from time to time as the work progresses, or for partial performance.<sup>2</sup> They are enforceable only to the extent of the money due upon the contract made by the original contractor, and according to its terms.<sup>3</sup> If the original contractor fails to perform his contract, or if he has performed it in part, and there is no money due to him according to its terms, or if, having performed it, he has been fully paid before notice of the lien, there is no lien against the property of the owner.<sup>4</sup>

Under the foregoing statute, if, in an action by a sub-contractor to enforce a lien on a building, in a case where the contractor abandoned the contract before the building was completed, the owner relies for a defence on a clause in his contract with the contractor, which provides "that, should said contractor refuse or neglect to supply a sufficiency of materials, the owner shall have the power to provide materials and workmen, after three days' notice, and the expense shall be deducted from the amount of the contract," he must aver, in his answer, that the contractor neglected to supply a sufficiency of materials, and was notified in writing to proceed with the work in three days, or that the owner would complete the house himself. If, in such a case, the owner relies on the fact that the sums he has paid the contractor before he abandoned the work, and the cost

<sup>1</sup> [Fisken v. Milwaukee B. & I. Co., 86 Mich. 199.]

<sup>2</sup> Cox v. W. P. R. Co., 44 Cal. 18.

<sup>3</sup> Dore v. Sellers, 27 Cal. 238; Blythe v. Pulteney, 31 Cal. 233.

<sup>4</sup> Dingley v. Greene, 54 Cal. 335.

of completing the building, amount to more than the contract price, he must aver in his answer that the sum paid the contractor was due when it was paid, and that the aggregate of liens sought to be foreclosed exceed the amount which was to be paid the contractor, and that the sums paid out by him after the abandonment by the contractor were paid to complete the building according to the terms of the contract.<sup>1</sup> In another State, where "in no case shall the owner be compelled to pay a greater sum for or on account of such house, than the price stipulated in the original contract," the owner need not pay anything to a sub-contractor when he is compelled to exhaust the original contract price to complete the building.<sup>2</sup> So, where the lien of the sub-contractor is confined by statute to the amount of the original contract, and it appeared that the contractor had abandoned the work and the owner had fully paid him all he was entitled to before receiving any notice of the sub-contractor's claim, the latter is not entitled to recover.<sup>3</sup> In New York the owner is entitled to credit against a sub-contractor, even after notice of his lien is filed, for money expended by him in order to complete the building, which the contractor had failed to do.<sup>4</sup> If, according to the terms of the agreement of the owner and contractor for erecting and completing a building, the contractor could not recover of the owner the last payment, on the ground that the building was not completed, which was required by the agreement before such payment would be due, a workman under the contractor, who had filed a lien, could not recover of the owner.<sup>5</sup> In Iowa, where, in the lien of a sub-contractor, it is provided that "it shall be enforced against the property only to the extent of the balance due at the time of the service of such notice," it has been held not to extend beyond that amount, and does not prevent the owner from completing the contract.<sup>6</sup> Where a sub-contractor has the right to give notice to the owner of his demand, and the latter shall retain the amount due or to become due the contractor, if by the terms of a contract the owner has the right to retain the moneys earned until the completion of the building, and then to make deductions from such sum on account of the delay of the work, such right will be of equal avail, whether the suit is by the contractor, or under the

<sup>1</sup> Quale v. Moon, 48 Cal. 478.

<sup>2</sup> Biggs v. Clapp, 74 Ill. 335; Morehouse v. Moulding, Id. 323; Culver v. Elwell, 73 Ill. 536.

<sup>3</sup> Schultz v. Hay, 62 Ill. 157.

<sup>4</sup> Rodbourn v. Seneca Lake Co., 67 N. Y. 215.

<sup>5</sup> Preusser v. Florence, 51 How. Pr. (N. Y.) 385; 4 Abb. N. Cas. (N. Y.) 136.

<sup>6</sup> Cutler v. McCormick, 48 Iowa, 406.



statute by the sub-contractor.<sup>1</sup> If the contractor, although the contract is never completely executed, is in a position which enables him to recover from the owner in an action either upon the contract or upon *quantum meruit* for contract work done, a notice will reach the amount so recoverable.<sup>2</sup> "If we understand the position of Grove's counsel it is this; that neither a contractor or sub-contractor can enforce a mechanics' lien when the building is not completed according to contract. We cannot accept this as a correct statement of the law. There is certainly no legislative enactment so limiting the right of the mechanic or material-man to a lien. He must establish his account, and the lien attaches for the amount found to be due thereon. If the contract for the erection of the building is not fulfilled by the contractor it does not necessarily defeat his lien. The owner of the building is entitled to set up as a counter claim any damages he has sustained by reason of the breach of an agreement, and the lien attaches for the amount actually due after deducting such damages."<sup>3</sup> If the contractor abandons the work after being paid for what is done, and the owner has it completed for a less sum than remained due under the contract, a sub-contractor may claim to the extent of the excess.<sup>4</sup>

§ 62 *h*. **What are Good Payments against Sub-contractor.** — Where the sub-contractor has the right to give notice to the owner, and "all payments made by the owner in good faith, to apply on his contract, shall operate to extinguish the lien, unless written notice is served before such payments," to defeat the statute the owner is allowed to show that payment has been made "without notice" of the lien, of all that he became liable to pay.<sup>5</sup> But while the contract remains in force, no payment made to the contractor, after notice of lien has been filed by a sub-contractor, can affect the lien thereof.<sup>6</sup> After notice to the owner from a sub-contractor, the owner cannot rightfully pay the original contractor so as to defeat the demands of the sub-contractors, nor can he pay one sub-contractor in full, and another nothing, as his partiality may determine. The balance due must be paid *pro rata*.<sup>7</sup> The right of a sub-contractor to payment out of moneys due the contractor is not cut off by an assignment for the benefit of creditors, made by the contractor. But the assignee has a right to contest the validity of the lien

<sup>1</sup> Reeve v. Elmendorf, 38 N. J. L. 125.

<sup>5</sup> Smith v. Merriam, 67 Barb. (N. Y.)

<sup>2</sup> [Mayer v. Mutchler, 50 N. J. L. 403.

162.]

<sup>3</sup> [Millsap v. Ball, 30 Neb. 728, 734.]

<sup>6</sup> McMillan v. Seneca Lake G. & W. Co., 12 N. Y. Supr. Ct. 12.

<sup>4</sup> [Wiggins v. Bridge, 70 Cal. 437, 439.]

<sup>7</sup> Morehouse v. Moulding, 74 Ill. 323.

upon every ground available to the owner of the premises.<sup>1</sup> Where the law disallows any payment made by collusion, for the purpose of avoiding the provisions of this act or in advance of the terms of any contract, payments made in advance, although without fraud or collusion, cannot be allowed. But if payments in advance were made to the lienor himself, he cannot afterwards dispute the right of the owner to have them credited because they were made too soon.<sup>2</sup> So a payment found to have been made by collusion, for the purpose of avoiding payment, though not found to have been made in advance of the terms of the contract, is ineffectual against the lien.<sup>3</sup> Again, where a mechanic showed that a receipt in full between the owner and contractor was given to defeat sub-contractors, and no payment had in fact been made, it is not necessary that a referee should find fraud in order to sustain a judgment against the owner.<sup>4</sup> But under a statute providing that if the owner shall pay to his contractor any money "in advance of the sum due on said contract, he shall not be entitled to credit for same," and where a contractor was unable, for want of means, to go on with his contract, the owner, to enable him to do so, in consideration that he would not abandon the contract, in good faith made payments faster than he was required by his original contract; and also, with the assent of the contractor, bound himself to other parties, in consideration of their furnishing materials, — it was held that the money thus paid, and liabilities assumed were not payments in advance, within the above law.<sup>5</sup> Payments made on verbally accepted orders before any notice of lien is served on owner by sub-contractors are good, though the payments are made after service of the notice.<sup>6</sup> If the owner has prior to filing of the lien at the request of the contractor assumed an obligation to pay another sub-contractor or material-man, to the extent of such obligation it constitutes a payment. Where, therefore, the owner has prior to the filing of a lien accepted orders drawn upon him by the contractors or material-men, and the contractor has thereupon receipted as for so much payment to the full amount of his remaining liability upon the contract, no lien is acquired. So also if the liability of the owner is assumed at his request and for his benefit by a third person, and this is accepted as payment by the contractor so far as subse-

<sup>1</sup> *Smith v. Baily*, 8 Daly (N. Y.), 128.

<sup>2</sup> *Post v. Campbell*, 83 N. Y. 279.

<sup>3</sup> *Hofgesang v. Meyer*, 2 Abb. N. Cas. (N. Y.) 111.

<sup>4</sup> *Crawford v. O'Connor*, 73 N. Y. 600.

<sup>5</sup> *Schneidhorst v. Luecking*, 26 Ohio, 47.

<sup>6</sup> *National Stock Yards v. O'Reilly*, 85 Ill. 546.

quent liens are concerned, it is payment.<sup>1</sup> The owner is entitled to be credited with the amount of promissory notes indorsed by him prior to service of notice.<sup>2</sup> But where a statute provides that, in case of the liens of sub-contractors, the owner of the building shall be allowed whatever payments he shall have made in good faith to the original contractor before receiving notice of such lien, a mere verbal guaranty by the owner of the payment of certain debts of the original contractor for materials purchased for the building does not constitute "payment" to the contractor within the meaning of the statute. Nor will the rights of the sub-contractor be affected by a payment after notice of the debt guaranteed.<sup>3</sup> Where the contractor C. pays money to B., a material-man taking B.'s receipt, and B. applies the money on a former claim, but C. uses the receipt to make the owner settle with him in full in the belief B. is paid on the present contract, the use of the receipt being without B.'s knowledge, he may still make good his claim against the owner.<sup>4</sup> It would seem that payment for extra work before it is completed, in the absence of express contract requiring payment before completion, is not good against sub-contractors.<sup>5</sup> And in a later case the same was held to be the law, although the owner merely knew that the materials had been furnished by some one, without knowing by whom, nor that they were obtained on credit. The test question is whether by reasonable diligence the owner could have ascertained the existence of the plaintiff's right.<sup>6</sup>

§ 62 *i. Payments to Sub-contractors.* — If the material-man obtains judgment against the owner and against the property, the owner may deduct the amount of the judgment from any sum due the contractor on the contract price.<sup>7</sup> In a suit by the contractor the owner would not be entitled to credit for the sums due workmen who have given notice, unless the owner has made payment, when the statute only authorizes a "deduction when payment has been made."<sup>8</sup>

§ 63. *Necessity of Notice to Owner.*<sup>9</sup> — The time when this liability of the owner is fixed is the filing or service of notice by the sub-contractor. The mere existence of claims by them will

<sup>1</sup> [Gibson v. Lenane, 94 N. Y. 163. See § 61.]

<sup>2</sup> Smith v. Merriam, 67 Barb. (N. Y.) 403.

<sup>3</sup> Gridley v. Sumner, 43 Conn. 14.

<sup>4</sup> [Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362.]

<sup>5</sup> [Andrews v. Burdick, 62 Iowa, 714.]

<sup>6</sup> [Gilchrist v. Anderson, 59 Iowa, 274,

<sup>7</sup> Whittier v. Wilbur, 48 Cal. 175.

<sup>8</sup> Wightman v. Brenner, 26 N. J. Eq.

<sup>9</sup> [See §§ 62 c, 337, 338, 343.]

not prevent the owner from paying the contractor, and thereby discharging himself from the debt.<sup>1</sup> Thus, where the law is that "such lien for materials shall not attach, unless the person furnishing the same, before so doing, gives notice to the owner of the property to be affected by the lien, if such owner is not the purchaser, that he intends to claim such lien," the notice is essential, and no lien exists without it.<sup>2</sup> Justice, both to the owner and the contractor, requires that when the work is done, and no notice is given by mechanics and others, the owner should be permitted to pay for it. The contractor can sue the owner and compel him to make the payments stipulated in the contract; and, without notice, the owner would be utterly without defence to such suit. It is not ordinarily in the power of the owner to ascertain, before notice of claim filed, whether the contractor has paid his laborers, sub-contractors, or material-men, or not, and would expose an owner to gross wrong through collusion between the contractor and laborers or material-men, and furnish a bribe to dishonesty and fraud. For example, the contractor, performing the contract in all things on his part, collusively suffers the laborers and material-men to remain unpaid until he has finished the house; and they collusively suffer such contractor to collect the money due, it may be by legal process without filing any notice, and for the very purpose of defrauding the owner. When mere silence is all that is necessary to the consummation of the fraud, it will rarely, if ever, be possible to prove the collusion, and no protection would be afforded to the owner against its consequences.<sup>3</sup> A proceeding to obtain a lien by a sub-contractor should be strictly *in invitum* as against the property-holder.<sup>4</sup> It is essential that the sub-contractor should give notice to the owner as provided for in the law.<sup>5</sup> In Maryland the sub-contractor must give notice to the owner or his agent within sixty days after the materials were furnished, and the notice must, if possible, be served personally on the owner or his agent; if not possible, it may be fastened to the building.<sup>6</sup> In Illinois, when the owner is not notified of the claims of sub-contractors by the contractor, the sub-contractors must give notice to the owner within forty days after the completion of the sub-contract or within forty days after payment

<sup>1</sup> McAlpin v. Duncan, 16 Cal. 126;  
Knowles v. Joost, 13 Cal. 620.

<sup>2</sup> Robbins v. Blevins, 109 Mass. 219.

<sup>3</sup> Doughty v. Develin, 1 E. D. Smith  
(N. Y.), 625.

<sup>4</sup> Hoffman v. Walton, 36 Mo. 613.

<sup>5</sup> [Shafer v. Archbold, 116 Ind. 29;  
Eastman v. Newman, 59 N. H. 581.]

<sup>6</sup> [Kenly v. Sisters of Charity, 63  
Md. 306; Conway v. Crook, 66 Md.  
290.]

should have been made to the sub-contractor.<sup>1</sup> In Montana a sub-contractor must notify the owner of the probable value of the materials before or at the time they are furnished.<sup>2</sup> One who furnishes materials to a contractor must give notice to the *owner*, and in case of a church, the title to which is in the bishop, notice to the priest is insufficient.<sup>3</sup> The owner, who is required by statute to be notified by a sub-contractor or material-man, is the person who was the legal owner when the contract was made or the materials were furnished.<sup>4</sup> The notice may be *served* on the owner or his agent, but must be *addressed* to the owner. A notice addressed to an agent having no interest in the premises to which a lien could attach is insufficient.<sup>5</sup> The owner's absence from the State will not excuse failure of the sub-contractor to serve notice on him or his agent within the statute time.<sup>6</sup> Laborers must give the statutory notice or their claims will not have the security and priority of a lien.<sup>7</sup> In Dakota a sub-contractor must give notice to the owner "before or at the time," he furnishes any materials.<sup>8</sup> The Florida Act of 1885 repealed the provision of the act of March 7, 1877, concerning notice by a sub-contractor to the owner.<sup>9</sup> The word "creditor" in § 4, ch. 82, R. S. (Illinois, 1887), requiring a statement to be filed with the clerk of the circuit court, does not include sub-contractors, because subsequent provisions in respect to sub-contractors are inconsistent with the requirements of § 4.<sup>10</sup> In New York it is not necessary to the validity of a lien that a copy of the notice of a lien should be served upon the owner; that is only necessary to prevent payments by the owner to the contractor, after filing of the lien, to the prejudice of the lienor.<sup>11</sup>

§ 63 *a*. **Proceedings to be taken by Sub-contractors.** — Where a law provides that a sub-contractor may give notice to the owner of what is due him, and the owner is authorized to retain the amount so due and claimed out of the amount owing by him to the contractor, and "if the same be not paid by the contractor, such owner, on being satisfied of the correctness of such demand, shall pay the same," etc., an action cannot be maintained against the owner, upon a notice, when the owner has reasonable cause to dispute the claim of the person serving the notice. When

<sup>1</sup> [Butler & M. v. Gain, 128 Ill. 23, 27; Gain v. B. & M., 29 Ill. App. 425.]

<sup>2</sup> [Whiteside v. Lebcher, 7 Mont. 473.]

<sup>3</sup> [Gross v. Butler, 72 Ga. 186.]

<sup>4</sup> [Brown v. Wright, 25 Mo. App. 54.]

<sup>5</sup> [Legnard v. Armstrong, 18 Bradw. 549.]

<sup>6</sup> [Doyle v. Truitt, 23 Mo. App. 448.]

<sup>7</sup> [Stichler v. Malley, 94 Pa. St. 82, 84.]

<sup>8</sup> [M'Millan v. Phillips, 5 Dak. 294.]

<sup>9</sup> [Barbour v. Van Camp, 26 Fla. 40,

42.]

<sup>10</sup> [Maxwell v. Koeritz, 35 Ill. App. 300.]

<sup>11</sup> [Kenney v. Apgar, 93 N. Y. 539.]

thus disputed, the only course for such claimant is to verify it by a judgment against the contractor.<sup>1</sup> Again, where a code made it necessary for a sub-contractor, in order to entitle himself to a lien, to obtain a settlement with, and a written statement thereof from, his contractor, which shall be given to the owner, unless his contractor shall refuse, in which case he may make a statement himself, before the sub-contractor can make such statement, either the contractor or his duly authorized agent must have refused to sign the statement.<sup>2</sup> Such notice, when the statute requires it, should be in writing.<sup>3</sup> But the owner may waive this provision by receiving an oral account, and placing his rejection of the claim solely upon some other ground.<sup>4</sup>

§ 64. **Sub-contractor to prove Owner's Liability to Contractor.**<sup>5</sup>  
 —The proof of a sub-contractor should show that a payment has become due upon the contract, by the performance of work sufficient under the contract, before he can recover against the owner. The operation of the lien laws last quoted is to transfer to the sub-contractor so much of the contractor's claim against the owner as would be sufficient to pay the debt of the contractor to his sub-contractor. It is but reasonable to require the same amount of proof to recover against the owner for the same debt, whether the suit is brought by one or the other claimant. After showing that an indebtedness has existed, the discharge of that indebtedness must be proven by the owner; but, until the fact is shown that the building has so far progressed as to entitle the contractor to call for a payment under the contract, no case is made out, by which a sub-contractor can claim payment under the contract as assignee of the contractor. Nor is there any difficulty in making out the proof necessary on the part of the plaintiff. The law gives ample means to compel parties to produce the contract; and the plaintiff could easily show the state of the building at the time of commencing the suit to be such as to establish a payment under it, if such payment were due.<sup>6</sup> But after this proof has been made the *onus* of showing payments which will extinguish the lien is upon the owner.<sup>7</sup>

<sup>1</sup> Reeve v. Elmendorf, 38 N. J. L. 125.

<sup>2</sup> Mears v. Stubbs, 45 Iowa, 675.

<sup>3</sup> Robinson v. State Insurance, 55 Iowa, 489. [See § 343.]

<sup>4</sup> [Buckley v. Taylor, 51 Ark. 302, 306. See §§ 338, 343.]

<sup>6</sup> This section was cited with approbation in McMillan v. Seneca Lake, G. & W. Co., 12 Supr. Ct. (N. Y.) 15.

<sup>5</sup> Sullivan v. Brewster, 1 E. D. Smith (N. Y.), 681; Konkright v. Thomson, Id. 661; Hauptman v. Halsey, Id. 668; Haswell v. Goodchild, 12 Wend. (N. Y.) 373.

<sup>7</sup> Smith v. Merriam, 67 Barb. (N. Y.) 403.

§ 64 *a*. **When Sub-contractor's Right is lost by claiming too much.** — Where a statute gives the sub-contractor the right to serve notice on the owner, of the contractor's refusal to make payment, "and of the amount due to him or them and so demanded," and it proceeds to authorize the owner thereupon to retain "the amount so due and claimed," the amount demanded must be the amount due. As the amount claimed is to be retained by the owner, it has been said it would be injustice to allow more to be claimed than is justly due, and if he does, his whole claim is invalid.<sup>1</sup>

§ 64 *b*. **Contractor's Bond.** — Where the contractor gives a bond to pay for labor and materials, the owner paying such debts cannot recover on the bond unless the payment was necessary to protect his property from liens.<sup>2</sup> The mere existence of claims unpaid is not a breach of the contractor's bond of indemnity against liens.<sup>3</sup> If the owner pays the contractor prematurely the sureties on the contractor's bond are discharged.<sup>4</sup> Sureties on the contractor's bond describing the contractor as a corporation cannot set up that the principal was not a corporation, nor that the persons executing the bond had no authority to act for it.<sup>5</sup>

<sup>1</sup> Reeve v. Elmendorf, 38 N. J. L. 125.

<sup>2</sup> [Price v. Doyle, 34 Minn. 400.]

<sup>3</sup> [Simonson v. Grant, 36 Minn. 439.]

<sup>4</sup> [Kiessig v. Allspaugh, 91 Cal. 231.]

<sup>5</sup> [Jefferson v. M'Carthy, 44 Minn. 26.]

## CHAPTER VIII.

## PERSONS ENTITLED TO SUBJECT PROPERTY TO LIEN.

§ 65. **Creation of Lien an Act of Ownership.** — A fundamental principle underlying the ownership of property is the right of possession and enjoyment, to be disturbed only by the voluntary act of the owner.<sup>1</sup> The lien of the mechanic being a remedy by which the property of one man may be taken for the benefit of another, it necessarily follows that it can only arise by the free consent of him to whom it belongs. Hence, as will be seen hereafter, this lien exists only when a contract has been entered into with individuals competent, in contemplation of law, to become parties thereto. The law-making power has wisely, and through necessity, made this, in every statute on the subject, a condition precedent.<sup>2</sup> It is, however, no more necessary that the contract from which the lien is to follow as an incident should be the personal act of the owner than in other matters. Necessity has created and the law sanctioned the performance of the affairs of life by means of agents duly authorized by principals. In this voluntary authorization is the consent above referred to, of the owner, that his property may, upon the happening of certain definite events, be taken for the benefit of others. This agency may be implied as well as expressly created.<sup>3</sup> Every man must necessarily be presumed to know the public laws in existence, and to contract with reference to their provisions. Whenever, therefore, from public policy, it is found necessary to extend by statute a lien against the property of an owner, to answer to a sub-contractor, or others with whom he is not in privity, and the owner shall thereafter make such contract from which the statute declares the lien to sub-contractors and others shall flow, the original contract of the owner will be conclusively presumed to imply the consent that his property may be taken to pay indebtedness to sub-contractors thus im-

<sup>1</sup> *Brown v. Morrison*, 5 Ark. 217.

*Walkenhurst v. Coste*, 33 Mo. 401; *Mul-*

<sup>2</sup> *Galbreath v. Davidson*, 25 Ark. 490; *doon v. Pitt*, 54 N. Y. 269.

<sup>3</sup> *Muldoon v. Pitt*, 54 N. Y. 269.



posed by the law.<sup>1</sup> On this ground contractors have been allowed to pledge the credit of property to sub-contractors and material-men. When the owner has once placed himself thus by his own act, he cannot prevent the attaching of the lien of those authorized by statute, by forbidding them to perform the labor.<sup>2</sup> It may be asserted, on the other hand, that mechanics' lien laws do not authorize a lien binding the interest of an owner who does not, by himself or agent, enter into a contract for doing of work.<sup>3</sup> Only the interest of the lessee employing work done on a mine is affected by the lien. This must be the interpretation of a lien law in the absence of explicit provision to the contrary.<sup>4</sup> Houses built without knowledge of the owner of the land belong to him, and are free of lien.<sup>5</sup> The contract must be with the "owner" of the land,<sup>6</sup> and a contract with the person to whom the owner has agreed to give the rents for her life, will not base a lien.<sup>7</sup> When the contract has been lawfully terminated, the lien does not protect labor thereafter performed; as, for example, wages earned after property has been seized by a sheriff on execution, and in the custody of the law, do not give a lien.<sup>8</sup> Or where a row of houses was built, and part were sold and conveyed, and the conveyance recorded, a claimant can no longer charge, as against the houses sold, for bricks subsequently furnished on the original owner's account, to be used in and about the other houses in the row.<sup>9</sup> "Owner" means owner of any estate or interest in the building that the court may order to be sold, as a right under a partly performed oral contract for a lease for years.<sup>10</sup> Every person including all *cestuis que trust*, for whose use, etc., any . . . improvement shall be made, are included by the words "owner or proprietor" named in the act, not excepting minors over the age of eighteen years or married women.<sup>11</sup> The person who holds the legal title to the land is the "owner," and not the "contractor," although he has agreed to sell the land to C., and to construct a factory on it, and convey the whole to C.<sup>12</sup> If A. contracts with B., the owner, and before A. begins work or furnishes the materials contracted

<sup>1</sup> Donahy v. Clapp, 12 Cush. (Mass.) 440.

<sup>2</sup> Shaw v. Thompson, 105 Mass. 345.

<sup>3</sup> Knapp v. Brown, 11 Abb. Pr. (N. Y.) N. S. 118; Miller v. Hollingsworth, 33 Iowa, 224.

<sup>4</sup> [Hopkins v. Hudson, 107 Ind. 191, 194-195, citing Phillips, §§ 58-65 and Forbes v. Gracey, 94 U. S. 762.]

<sup>5</sup> [Sheer v. Cummings, 80 Tex. 294.]

<sup>6</sup> [Osgood v. Pacey, 23 Ill. App. 116; Burns v. Lane, 23 Ill. App. 504.]

<sup>7</sup> [Osgood v. Pacey, 23 Ill. App. 116.]

<sup>8</sup> Schrader v. Burr, 10 Phila. 620.

<sup>9</sup> Ortwine v. Caskey, 43 Md. 134.

<sup>10</sup> [Benjamin v. Wilson, 34 Minn. 517.]

<sup>11</sup> [Ambrose Manufacturing Co. v. Gapen, 22 Mo. App. 397.]

<sup>12</sup> [Hinckley v. Field's Biscuit, &c. Co., 91 Cal. 136.]

for, B. sells to C., A. does not lose his lien. The "owner" referred to by the lien law is the owner at the time of the contract.<sup>1</sup> A husband who erects a building for his immediate use or benefit on his wife's land, has such an interest in the building that he may be called the "owner" in the meaning of the lien law, and the fact that the ownership of the land is in the wife is not inconsistent with such interest in the husband.<sup>2</sup>

§ 66. **Owner of Legal Title.** — In regard to contracts made by parties holding the legal title, it has been held, under a statute, after enumerating the persons in whose favor the lien may be created "by virtue of any contract with the owner of the lands or his agent, or with any person permitted by the owner of the lands to build," that where a party holds the legal title, and makes improvements, the land is bound for the lien of the mechanics; and this party is the owner, though the funds with which the property was purchased belonged to other persons.<sup>3</sup> Where the work and materials for which a lien was claimed were furnished in the erection of a church for the use of a religious society, in the place of one which had been destroyed by fire; and the land upon which the former church stood, with the building upon it, was conveyed to a number of trustees, "to have and to hold to the said trustees and their successors in office in special trust that the said house shall always be secure to the society, to administer ordinances and discipline of said church, and to worship according to the rules and regulations which are or may hereafter be adopted," etc., and one of the trustees was surviving when the new church was built, but did not enter into, or in any manner become a party to, the contract for the new building, — under a statute which provided that "any person to whom a debt is due for labor performed or for materials furnished and actually used in the erection of any building or structure upon real estate, by virtue of an agreement with, or by consent of, the owner of such building, or any person having authority from or rightfully acting for such owner, . . . shall have a lien upon such building and upon the interest of the owner thereof," etc., it was held to be manifest from the above facts that the whole legal estate in the land and building vested in the grantees of the deed, and that the society and the ministers were the *cestui que trusts*. The election of new trustees by the society, in conformity with the usages of their

<sup>1</sup> [McAdow v. Sturtevant, 41 Mo. App. 220, 225-229.]

<sup>2</sup> [Estabrook v. Riley & Armin, 81 Iowa, 479, 481.]

<sup>3</sup> Anderson v. Dillaye, 47 N. Y. 678.

church, created no privity of estate between them and the trustees who took the land by the deed, and could have no effect in law to divest or change the title. Under the above statute, it was only a legal interest or estate that could be subjected to the lien, except in the case of equities of redemption, and these are legal estates against every one but the mortgagees, and the *cestui que trusts* have no right or power to create any charge upon the estate. To allow them to do so might be destructive of the trust.<sup>1</sup>

§ 67. **Owner of Equitable Estate.**—As a general rule, an equitable as well as legal owner of property may create a mechanics' lien. The word "owner" in the lien law covers one who has the equitable title.<sup>2</sup> Thus, under a statute that persons who furnish "materials by virtue of a contract or agreement with the owner thereof shall have a lien to secure the payment of the same, . . . together with his right, title, and interest in and to the land," the word "owner" includes owner in equity as well as at law.<sup>3</sup> The modern doctrine being that mortgages are but securities for the payment of debts, the mortgagor remaining the real owner, he is in the interpretation of these statutes universally regarded as "owner" or "proprietor," when in possession, to the extent of binding his own interest in the premises, although with no power to prejudice the estate of the mortgagee without his consent.<sup>4</sup> Thus, where the mechanic has a lien upon any lot or tract of land for work done or materials furnished at the instance of the "owner," the court remarked: Now the mortgagor, it is true, is the real owner of the land in equity; and, if he employ mechanics to make improvements upon it, they acquire a lien thereon for payment. For the mortgagee is considered as a creditor, not owner; and the only interest he has in the land consists in a lien or security for the payment of his debt. It is a mere chattel interest. The mortgagor may exercise the rights of owner if he do not commit waste or otherwise impair the security. The mortgagor is under no obligation to the mortgagee to repair buildings destroyed by fire. It is at his own discretion to repair them or not, in view of his own interest. Nor is the mortgagee bound to concur in making repairs or liable in any sense for the expense without his consent. The case then results in this, that repairs were

<sup>1</sup> Peabody v. East Met. S., 5 Allen (Mass.), 540.

<sup>2</sup> [Mortgage Trust Co. v. Sutton, 46 Kans. 166, 169, citing Phillips, § 81; Drug Co. v. Brown, 46 Kans. 543, 547.]

<sup>3</sup> Atkins v. Little, 17 Minn. 353; Rolins v. Cross, 45 N. Y. 768.

<sup>4</sup> Otley v. Haviland, 36 Miss. 19.

made at the request of the mortgagor, and upon his credit. The mechanic was also entitled to a lien on the mortgagor's interest in the land as a security for the payment. But as there was a prior lien of which the mechanic had notice, and as the interest of the mortgagor is subject to that lien, the mechanic could acquire no greater or higher interest by his contract with the mortgagor than that which the mortgagor possessed. The mechanic knew or might have known of the existence of the prior lien, and has no cause to complain that it is entitled to priority of payment. Under a different rule it would be in the power of the mortgagor to destroy the security by erecting costly improvements, the expense of which the estate improved could not be able to pay; and therefore the mortgagee is entitled to priority of payment over the lien of the mechanic for work done after notice of the existence of the prior lien, and the registry of the mortgage is such notice.<sup>1</sup> When the mortgagor acts as the agent of the mortgagee in procuring work to be done upon the mortgaged property, the mechanics' right of action is against the mortgagee alone; and no proceeding against the mortgagor can prejudice the right of the mortgagee to enforce his lien upon the property.<sup>2</sup> To same effect, in a dispute between a mortgagee and lien claimants, as to priority of their respective encumbrances on the mortgaged premises, where it was objected to the validity of the lien, that the building was not erected by the owner of the land or by his consent expressed in writing, and it appeared that, pending the erection of the building, the owner had conveyed away the land, but that the conveyance was merely as collateral security for the payment of a debt due to the grantee, that the deed was intended as a mortgage, and that on the satisfaction of the debt the land was reconveyed, it was held that these circumstances effectually disposed of the objection urged against the validity of the lien.<sup>3</sup> So where the owner of land contracts to sell it, and advances money to the purchaser to build thereon, a mechanics' lien for labor performed, filed before the giving of the deed, is good against the purchaser as "owner." But, as previously intimated in this section in regard to the mortgagor, it is only binding to the extent of the interest of the person with whom the contract was made.<sup>4</sup> After a decree of foreclosure of a mortgage and a sale of the mortgaged premises, the mortgagor has no such ownership in the

<sup>1</sup> Reid v. Bank of Tennessee, 1 Sneed (Tenn.), 262.

<sup>2</sup> Pride v. Viles, 3 Sneed (Tenn.), 125.

<sup>3</sup> Gordon v. Torrey, 2 McCart. Ch. (N. J.) 112.

<sup>4</sup> Hallahan v. Herbert, 11 Abb. Pr. N. S. 326.

premises as will support a lien for labor done or materials furnished on the premises.<sup>1</sup>

§ 68. **Mortgagee.** — Where “any person who shall by virtue of any contract with the owner thereof or his agent, or any person who in pursuance of an agreement with any such contractor, shall . . . perform any labor, . . . shall upon filing . . . have a lien to the extent of the right . . . at that time existing of such owner,” etc., no recovery by a sub-contractor can be had against the holder of the legal title, where the builder has not been employed by the legal owner, but erects the building for himself, and the legal owner holds the title temporarily, as security for contributions towards the erection.<sup>2</sup> While it is true that the interests of the mortgagee cannot be affected injuriously by acts of the mortgagor, it has also been decided that a mortgagee is not an “owner,” under the above statute. Thus, where a party before notice filed, but after work commenced, *bona fide* sells property, taking a mortgage to secure the deferred payments of the consideration, his interest in the property becomes a mere chattel interest, which cannot be made subject to the payment of mechanics, by filing a lien against the property for the purpose of preventing payments on the mortgage to him.<sup>3</sup> In another case a mortgagee was held not to be an “owner” within the meaning of a similar mechanics’ lien law.<sup>4</sup> A lessee’s mortgagee is not an “owner” within the New York lien law. His interest is a mere chattel, and not subject to the realty lien.<sup>5</sup>

§ 69. **Parties in Possession under Contract of Purchase.** — Parties having contracted for the purchase of property, and entered into possession, frequently make valuable improvements; and it is important to determine, under such circumstances, the right of lien against the land and buildings. It may, unless there is some contrary intention expressed by the legislature, be safely asserted that, so far as the vendee’s own equitable interests are concerned, he will be regarded as an “owner” or “proprietor,” under the mechanics’ lien laws.<sup>6</sup> So in Kansas one in possession under contract of purchase is an “owner” within the meaning of the lien law. And one who furnishes materials to him has a lien prior to one to whom said owner afterward upon gain-

<sup>1</sup> Davis v. Conn. Mut. Life Ins. Co., 84 Ill. 508.

<sup>2</sup> Cox v. Broderick, 4 E. D. Smith, 721.

<sup>3</sup> Id.

<sup>4</sup> Tompkins v. Horton, 25 N. J. Eq. 284.

<sup>5</sup> [Broman v. Young, 35 Hun. 173, 180.]

<sup>6</sup> Stockwell v. Carpenter, 27 Iowa, 119.

ing full title mortgages the property.<sup>1</sup> So where a party, having entered into possession under a contract to purchase, but never having been invested with the legal title to the property, is an "owner." Houses are frequently built under similar contracts; and in all such cases, unless the party should be deemed the owner, mechanics and material-men would be defrauded of their lien. Possession under such a contract, providing for the erection of buildings, and for the acquisition of the legal title upon their completion, constitutes an equitable ownership, upon which the liens of mechanics may properly attach; and upon the delivery of the conveyance to the vendee, by which the equitable will become merged in the legal title, the liens will be paramount to subsequent mortgages.<sup>2</sup> Again, where the law provides that the contract should be made with the "owner," and this word "includes any person who has an estate or interest in the land, and the lien extends to the whole of his interest," a mechanic may enforce his lien against property for work done or materials furnished under a contract made with a purchaser of the property improved, who held possession thereof under a bond for a deed.<sup>3</sup> Proof of ownership at the time of trial is sufficiently made out by evidence that the owner said, "I am the owner of the land," etc. It is not necessary that the proof should show a title by deed or demise.<sup>4</sup> A mechanic who has erected a building on the ground of another, under an agreement with the owner to convey the same on ground-rent, becomes the equitable owner of the building.<sup>5</sup> So an agreement contracting for the sale of premises to parties at a future day who were in the interval to build houses, does not prevent the relation of owner and contractor from being established, although the moneys to be advanced on the building contract were to be secured when a deed should be given, by a mortgage of the premises, not as a loan, but, as was expressly stated in the agreement, as a consideration for the finishing of the houses according to the contract.<sup>6</sup> So in Minnesota where a contract of sale requires the purchaser to build, those who furnish labor or materials have a lien on the vendor's estate including his rights under a subsequent surrender of the contract by the purchaser.<sup>7</sup> And in Illinois "where

<sup>1</sup> [Drug Co. v. Brown, 46 Kans. 543, 547 (citing Phillips, §§ 69, 139); Mortgage Trust Co. v. Sutton, 46 Kans. 166; Lumber Co. v. Osborn, 40 Kans. 168; Huff v. Jolly, 41 id. 537; Lumber Co. v. Schweiter, 45 id. 207.]

<sup>2</sup> Belmont v. Smith, 1 Duer (N. Y.), 675.

<sup>3</sup> Monroe v. West, 12 Iowa, 119.

<sup>4</sup> Merritt v. Pearson, 76 Ind. 44.

<sup>5</sup> Carson's Lessee v. Boudinot, 2 Wash. C. C. 33.

<sup>6</sup> McDermott v. Palmer, 11 Barb. (N. Y.) 9.

<sup>7</sup> [Hill v. Gill, 40 Minn. 441; Hickey v. Collom, 47 Minn. 565.]

a vendee, owning the equitable title, contracts for the erection of a building upon the express authority of the owner of the legal title (as a building clause in the contract for purchase), it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises, and be paramount to the lien of the vendor."<sup>1</sup> And in Missouri one in possession under a contract of purchase including a contract to erect buildings binds not only his own estate, but the vendor's also, by said erection.<sup>2</sup> By implication the vendor authorized the vendee to employ builders and get materials. The vendor by his contract has subjected his title to the plaintiff's lien.<sup>3</sup> So where there is a lien on a purchaser's interest and he surrenders, the vendor agreeing to pay the lien-claim, the lien attaches to the whole estate.<sup>4</sup> So a party is an "owner" of land on which a vendor's lien for the whole purchase-money is reserved.<sup>5</sup> A building contract made with one in possession of land under a contract to purchase, may be a contract with the owner within the meaning of the mechanics' lien law, and where the contract to purchase is not carried out, a lien against the building may be established, and the mechanic may obtain a judgment under which the building may be sold with a right of removal.<sup>6</sup> If a building is erected on land for which the party contracting for the work had but a parol agreement to purchase, and which was subsequently abandoned, a mechanics' lien attaches to the building only, and the holder of the legal title is not liable.<sup>7</sup> One who asks an agent for the sale of land what is the price of a lot, and says he will take it, but does not comply with the known conditions under which the holder of the lot has given the agent authority to make a binding contract, such a would-be-purchaser has no interest to which a lien can attach.<sup>8</sup>

§ 70. **When Vendee will not be considered as Owner.**—The decisions are, however, not entirely harmonious in holding that the purchaser is to be considered as owner, so as to pledge the credit of the building. If a statute give a lien "to secure wages by virtue of any contract with the owner thereof, or other person

<sup>1</sup> [Bohn M'fg Co. v. Kountze, 30 Neb. 719, 725-726; Henderson v. Connelly, 123 Ill. 98.]

<sup>2</sup> [O'Leary v. Roe, 45 Mo. App. 567.]

<sup>3</sup> [O'Leary v. Roe, 45 Mo. App. 567, 573; Henderson v. Connelly, 123 Ill. 98; Hilton v. Merrill, 106 Mass. 528; Smith v. Norris, 120 Mass. 58; Hill v. Gill, 40 Minn. 441; Hackett v. Badeau, 63 N. Y. 476; McGinnis v. Pennington, 43 Conn.

146; and Chicago Lumber Co. v. Schweiter, 25 Pac. Rep. 592.]

<sup>4</sup> [Boyd v. Blake, 42 Minn. 1.]

<sup>5</sup> Nazareth Lit. & B. Inst. v. Lowe, 1 B. Mon. (Ky.) 258.

<sup>6</sup> [Jodd v. Duncan, 9 Mo. App. 417.]

<sup>7</sup> [Pickens v. Plattsmouth Land, etc. Co., 31 Neb. 588.]

<sup>8</sup> [Huff v. Jolly, 41 Kans. 537.]

who has contracted with such owner for erecting such building, or for the purchase of the land, for the purpose of building thereon," it has been held that a party does not bring himself within its provision, by showing that he contracted with a person who was employed to erect the building by another party to whom the owner of the land had agreed to convey it on the performance of certain conditions, and afterwards did accordingly convey it.<sup>1</sup> A statute provided that "a person who performs labor, etc., by virtue of a contract with the owner thereof, shall have a lien thereon, to secure the payment of the amount due;" an obligee in a bond for the conveyance of land could not subject it to a lien for such cause.<sup>2</sup> Nor a person who builds for himself, under an agreement, though a merely verbal one, that he should purchase the land at an agreed price.<sup>3</sup> So where a mechanic, in pursuance of a contract made with a person who had a covenant for the conveyance of land, and had paid part of the purchase-money, furnished materials, and erected a building on the land, and afterwards the covenantee received a deed of the land, but at the same time mortgaged it to a third person, who advanced money to complete the purchase, it was held that no lien attached in favor of the mechanic under his contract.<sup>4</sup> So, if a lien was given for "debts contracted by the owners thereof," there was no lien for bricks furnished for buildings by orders of a person who was erecting them on an agreement with the defendant, the owner of the ground, though such an agreement was unknown to the person furnishing the bricks, and though the defendant was the ostensible owner of the ground and building: the contract, to give a lien, must have been with the real owner.<sup>5</sup> A party having a mere contract of purchase cannot charge a building he is erecting with a lien, under a statute that "any person to whom a debt is due for labor . . . by virtue of an agreement with, or by consent of, the owner of such building," etc., as against the vendor, because he is not the owner.<sup>6</sup> But under this statute a contract between A. and B. for A. to advance money to B. to be spent in erecting houses on A.'s land and to convey the land to B., or whomsoever he may designate, for a certain price, and B. to erect the houses and purchase the land, or find a purchaser for it, subjects the estate

<sup>1</sup> *Metcalf v. Hunnewell*, 1 Gray (Mass.), 49; same statute as cited in 1 Gray, 297; *Loonie v. Hogan*, 5 Seld. (N. Y.) 297.  
435.

<sup>2</sup> *Johnson v. Pike*, 35 Me. 291.

<sup>3</sup> *Gray v. Carleton*, 35 Me. 481.

<sup>4</sup> *Thaxter v. Williams*, 14 Pick. (Mass.)

<sup>5</sup> *Steinmetz v. Boudinot*, 3 Serg. & R. (Penn.) 541.

<sup>6</sup> *Hayes v. Fessenden*, 106 Mass. 228; *Poor v. Oakman*, 104 Mass. 309.



to a mechanics' lien on the ground of consent given by the owner.<sup>1</sup>

§ 71. **When a Vendor is not "Owner."** — Different results from those stated in the preceding section have been reached under a law which required the contract to be made "with the owner thereof, or his agent, or any persons who, in pursuance of an agreement with any such contractor, shall, in conformity with the terms of such contract, perform any labor," etc., where it was said that an owner of the legal title to land, who makes a contract with the builder, whereby the latter agrees to erect thereon a building, and the former to make advances in aid of the construction, and when the building shall be completed to convey it with the land to the builder, provided he performs certain covenants contained in the contract, — the purchase-money and advances to be secured by a mortgage upon the premises simultaneously with the making of the conveyance, — is not the "owner" of the premises; and hence, under such circumstances, a person who has furnished materials to the building in pursuance of an agreement with the builder, and in conformity with the terms of the contract with the legal owner of the land, acquires no lien by filing the notice prescribed, specifying the latter as owner.<sup>2</sup> So a vendor who has sold his lots, and made an agreement to make further advances, and accept a mortgage as security, after the purchaser should have erected buildings thereon, is not an "owner" under the above mechanics' lien law.<sup>3</sup> Where the statute confines the lien to such interest in the premises as "belongs to the person who caused such building to be constructed," it limits the right of lien to such interest as the person undertaking to build, and entering into contracts to that end, then possessed, and can in no respect have any retrospective or retroactive operation upon the title of his vendor; so that the vendor in a building loan contract is not liable as "owner" under the above act.<sup>4</sup> Although a parol contract for the conveyance of real estate cannot be enforced, if either party refuse to fulfil it, yet it is not illegal, nor is it void in such sense that the owner of the fee is the owner of a building erected on the land, in reliance upon such parol contract, by the person to whom the conveyance is thus agreed to be made. Accordingly, where the owner of the fee of land agrees by parol to convey it ultimately to the purchaser, and immediately to loan him money to aid in

<sup>1</sup> *Hilton v. Merrill*, 106 Mass. 528.

<sup>4</sup> *Burbridge v. Marcy*, 54 How. Pr.

<sup>2</sup> *Miller v. Clark*, 2 E. D. Smith, 543. (N. Y.) 446; *Dugan v. Brophy*, 55 How.

<sup>3</sup> *Gay v. Brown*, 1 E. D. Smith, 725. Pr. (N. Y.) 121.

erecting a building thereon, and the latter accordingly proceeds to erect such building, the vendor is not the "owner" of the building, under the above mechanics' lien law, so that his interest in the premises can be subjected to a lien for the value of the work or materials furnished by third parties under the employment of the vendee. A sub-contractor, claiming under that statute, must show the existence of a contract between his employer and the owner, and also, what is equally essential, that his work was done or materials furnished in conformity therewith. The mere implied contract on the part of the owner, which may be inferred from suffering improvements to be made upon his premises, to pay what the same may be worth, with no stipulation or agreement as to price or character of the improvements, is not sufficient to enable a laborer or material-man employed by the builder to acquire a lien under the statute, because by the statute the liability of the owner is limited to the amount stipulated to be paid in the contract.<sup>1</sup>

**§ 72. Contract of Sale is not a Consent by Vendor to pay for Improvements.** — A contract of sale does not vest in the purchaser any right to bind the estate of the owner for payment of the improvements made, or operate as a consent on his part that he will pay for them in the event the purchaser shall make default in his contract of purchase, and the estate revert to him. Thus where the law was that "when any contract shall be made in writing between the proprietor or proprietors of land on the one part, and any person or persons on the other part, for erecting any house, . . . the person who shall in pursuance of such contract, furnish, . . . shall have a lien to secure the payment of the same," etc., one of the contracting parties must have been a proprietor of the land on which the building was to be erected; and a mere contract for the conveyance of land to one of the parties, on payment of the price by a fixed time, did not bring the case within the statute so that a lien might attach against the vendor of the land.<sup>2</sup> Where an owner agreed with a party that the latter should build a house on the lot, and the latter to forfeit all claim if the house was not built, the party began the house, but, after building the cellar wall, abandoned it, it was held that a mason who had built the cellar wall under contract with him could not establish a lien as a sub-contractor upon the lot, as against the owner.<sup>3</sup> So the lien of a mechanic under a

<sup>1</sup> Walker v. Paine, 2 How. Pr. (N. Y.) 662.

<sup>3</sup> McGinniss v. Purrington, 43 Conn. 143.

<sup>2</sup> Conner v. Lewis, 16 Me. 268.

statute which provides "that all and every dwelling-house shall be subject to the payment of the debts contracted for, or by reason of, any work done, before any other lien which originated subsequent to the commencement of such house or other building," attaches only upon the interest of the person for whom it is erected, and does not encumber any pre-existing right or title of any other person. If, therefore, when the lien attaches, the person causing the building to be erected has no title to the premises on which it stands, but a mere right, vesting in contract, to a conveyance on the performance of a condition precedent, and that right is afterward lost by his failure to perform the condition, subsequent proceedings to enforce the lien will convey no right or title to the purchaser. Where a party has contracted for the sale of his land, and the vendee has gone into possession under his contract, the latter must be supposed to make any improvements with the expectation of obtaining a title when the terms of his contract are performed. And the owner's knowledge of the erection of the building, without dissent, instead of being construed into an assent to become chargeable for the labor and materials, in fact only shows that he might have looked upon the expenditures as a guaranty that the contract would be performed by the vendee. The building is erected by the latter, subject, of course, to the paramount title of the vendor, who can no more be chargeable with such improvements, after a breach of the contract, than a purchaser, under a mortgage sale, for improvements made on the premises subsequently to the execution of the mortgage. His silence when no assent is required, and when the expenditures are made by one in possession, with the right to improve, and the expectation that the improvements will enure to his own benefit by his subsequently procuring a title under the contract, can never be considered as an implied promise by the owner to pay for the expenditures, or as charging his estate with a lien for them. If such were to be the effect, all such contracts, highly beneficial as they often are to the contracting parties, must cease. No landed proprietor would thus contract to convey his land upon the payment of the price at a future day, if the bargainee should have under his contract the power to encumber the premises by erecting buildings thereon, in such manner as to charge him, upon a failure in the performance of the contract, with the payment. This would be to allow the opposite party to break his contract of purchase, and thereupon to compel the owner to pay for improvements without limit, or lose his property on the lien, without

consent and without compensation.<sup>1</sup> It is a general and safe rule that no man can give a lien on that which he does not own, unless he be agent for the owner. Accordingly, where a party is merely a conditional purchaser in possession, and the condition on which title was to vest in him was not fulfilled, he can create no lien as against the true owner.<sup>2</sup>

§ 72 *a*. **When Vendor consents to Improvements.** — But where a law provides that "if the building be erected with the knowledge of the owner of the lands or of any person having or claiming an interest therein, it shall be held to have been erected at the instance of such owner or person claiming an interest, and such interest so held or claimed shall be subject to the lien of the material-man or laborer," etc., and an insurance company loaned the owner of a lot and uncompleted building, money for the purpose of finishing the building, and took from him a deed of trust conveying the fee, defeasible on the payment of the debt, and afterwards knowingly permitted the building to go on without giving notice that it would not be responsible therefor, the interest in the property held by the insurance company was subject for work done and materials furnished after the making of the deed of trust. It is said that such a provision is just, and that the legislature has power to enact it.<sup>3</sup> The vendor of land under contract of sale who knows the vendee is building on the land, must give notice that he will not be responsible, or the lien will attach to the fee.<sup>4</sup> Where a statute gives a lien to persons furnishing materials used in the erection of a building, whenever the owner of the land consents to the erection of the building upon it, such consent may be proved by acts and declarations as well as by direct evidence. It is not necessary that the acts of the lienor should not have been in any way induced by the consent of the owner of the land.<sup>5</sup> It is enough if the owner, knowing that labor or materials are being furnished to the contractor, does not object to it. If he is not satisfied that a particular person should perform labor or provide materials, for any reason, he can object to it, and thus prevent such person from ever getting a lien on his property.<sup>6</sup> But the above statute does not authorize the erection of a lien as against the owner of the legal title to property in regard to which there is

<sup>1</sup> *Scales v. Griffin*, 2 Doug. (Mich.) 54.

<sup>2</sup> *Walker v. Burt*, 57 Ga. 20.

<sup>3</sup> *Fuquay v. Stickney*, 41 Cal. 583.

<sup>4</sup> [*Avery v. Clark*, 37 Cal. 620, 627.]

<sup>5</sup> *Nellis v. Bellinger*, 13 N. Y. Supreme Ct. 560.

<sup>6</sup> *Wheeler v. Scofield*, id. 655; *Hart v.*

*Wheeler*, 1 Thomp. & C. (N. Y.) 403;

*Gates v. Whitcomb*, 6 Thomp. & C.

(N. Y.) 341.

an outstanding executory contract of sale with a vendee entitled to and in the possession of the land, for materials furnished the vendee on a building contract made with him, or for his own benefit, unless such supplies are furnished with the express consent of the owner.<sup>1</sup> In another State it was held that an owner of land who has given a bond for a deed upon the understanding that the obligee would build upon the land, and who, after a mechanic has begun to build thereon, under an entire contract with the obligee, gives his consent that the mechanic may build, thereby subjects the land to a lien for all the work and materials furnished by the mechanic under the contract, although a part of the work has been done and a part of the materials furnished before he gives his consent, and although he is ignorant of the precise terms of the contract.<sup>2</sup> Consent of the vendor to the improvement binds the whole estate (fee and all, if he holds the fee) for materials furnished one in possession under contract of purchase.<sup>3</sup>

§ 73. **When Consent of Owner to pay for Improvements must be in Writing.**—Some States have undertaken to provide by express enactment that the consent of the owner to be responsible for improvements made by parties in possession under contract for purchase must be express, and in some cases manifested in writing. Thus, "if any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant or other person so erecting such building shall be subject to the lien created by this act, unless such building be erected by the consent of the owner of such lands in writing, which writing may be acknowledged and recorded as deeds are," etc. This act contemplates a written consent, which may be recorded. A contract to sell the land, upon the condition that the vendee will erect certain buildings thereon, and agreeing to advance a certain sum of money for that purpose, and, when such buildings are completed, the owner will give a deed for the land, and take a mortgage from the vendee to secure the purchase-money and the money advanced, is not such consent as will make the land subject to lien for labor performed at the instance of the bargainee. A mere implication to be found in such a paper, which was obviously designed to answer a temporary purpose, and not to be recorded, is not the consent contemplated. Under such a statute the owner of land who permits a building to be erected by another upon it has this pro-

<sup>1</sup> *Craig v. Swinerton*, 15 Supr. Ct. (N. Y.) 144.

<sup>2</sup> *Davis v. Humphrey*, 112 Mass. 309.

<sup>3</sup> [*Hammond v. Shephard*, 50 Hun, 318.]

tection: until he consents explicitly in writing to have it become subject to the provisions of the lien law, his land cannot be held. The law exempts it until that consent is given, upon the plainest principles of natural justice, that one man's property shall not be taken to pay another man's debts. This statute contemplates that consent shall be manifested in a way similar to that required to pass an interest in lands. It adopts the analogy of a deed, acknowledged and recorded, by permitting the consent to be perpetuated and published. It is evident that this provision was mainly, if not entirely, intended to enable the party erecting the building, as owner, to get a credit on the faith of the building and land. That is the object of the recording. It seems obviously right that a writing evidently designed to answer a temporary purpose, not embodying the agreement of the parties or any consent in direct terms, but only by vague implication, manifestly framed with the opposite intent, to prevent liens attaching, should not be made by construction to do that which neither of the parties intended. Material-men and others may protect themselves; if they rely upon a lien for payment, they may require explicit consent to be signed and delivered, and also acknowledged and recorded before they give credit. No injustice is done them by refusing them a lien on the lands of a stranger, against the intention of the parties to a paper drawn for an entirely different purpose, and an agreement to convey is not such.<sup>1</sup> So where the law declares the lien to be upon "the estate which the owner had at or before the commencement of the building, subject to all prior encumbrances, and free from all encumbrances created afterwards," and further that "the estate of any owner shall not be subject to a lien for a building erected by another person, unless it be done by consent of the owner in writing," a contract to convey, although in writing, does not amount to a consent in writing to the erection of buildings which will satisfy the requirement. Hence the estate of the vendor is not affected by the lien.<sup>2</sup> Where a law, after defining the persons in whose favor the lien might be created "by virtue of any contract with the owner of the lands or his agent, or with any person permitted by the owner of the lands to build," concluded as follows: "In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner shall be deemed to be the owner until a deed shall have been actually delivered so

<sup>1</sup> *Associates of Jersey v. Davison*, 5 Dutch. 415.

<sup>2</sup> *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. (5 C. E. Green) 13.

as to pass the fee-simple of said premises," it was held that a lien cannot be acquired for work done under a contract with the equitable owner, as against the person holding the legal title, unless the building is constructed by his permission. When the work is done by his consent, the lien attaches to the land, and is a charge upon his interest therein. If no consent has been given, the contract is not within the statute.<sup>1</sup>

§ 74. **Party subsequently becoming Owner.** — The necessity of a party being owner at the time when the contract is made, or whether a subsequently acquired title will be sufficient to authorize the existence of the lien, depends largely upon the particular statute under consideration. Some States have by express enactment required the contract to be made with the person who is the owner of the premises at the time of its being entered into; in which cases, where there is no fraud, the statute is decisive. Thus, under a statute giving a lien "to the extent of the right, title, and interest then existing of the owner," — that is, at the time of making the contract, — there must be evidence to show that at the time the contract for the work was made, he was the owner. For example, where a lease took effect from the time of its delivery to the grantee, and not from the date on which it purports to have been executed, it was held that a contract made with the lessee before its delivery secured the mechanic no lien.<sup>2</sup> It has also been decided that no lien can be acquired under a statute which provided that "such lien shall not attach, unless the contract is made in writing, and signed by the owner of the land, or by some person duly authorized by him, and recorded in the registry of deeds," etc., for labor or materials furnished under a written contract, not purporting to create such a lien, made with one who has, at the time of its execution and delivery, no estate in the land, although he acquires a title before the contract is recorded, or the labor and materials furnished. The obvious meaning of this statute is, the person who procures the work to be done and who signs the contract is then the owner of the land, or of some right or interest therein; and the lien thus given cannot attach to property which a party did not own at the time of the execution of the contract, as there was no estate to which it could attach. And it was further held, that, where there is nothing expressed in the contract that a party is the owner of the property, none can be implied that he is the owner at the time of its execution, and

<sup>1</sup> Rollin v. Cross, 45 N. Y. 768.

<sup>2</sup> De Ronde v. Olmstead, 5 Daly (N. Y.), 398.

that he is therefore not estopped from setting up an after-acquired title.<sup>1</sup> To create a valid lien under the above statute requires that the person whose agreement or consent is necessary for that purpose should have the capacity to confer that right at the time of such agreement or consent. A subsequent conveyance to him is not the enlargement of an estate or interest to which the lien had already attached. It is a new title; and there is no estoppel by which that newly acquired title will enure to the support of the interest which a mechanic claims and can derive only by force of the statute. It follows that a contract between A. and B., for B. to buy, and A. to sell and convey to him, land owned by A., does not subject the estate to a mechanics' lien, under a statute which provides for the lien when the debt is due "by virtue of an agreement with, or by consent of, the owner," etc., in favor of a person who by B.'s employment performs labor in erecting a building which B. proceeds to put on the land, although B. afterwards takes a conveyance of the land from A. in pursuance of the contract, and A. had notice of B.'s intention to build, and knew of the progress of the building, and never made objection.<sup>2</sup> In a subsequent case in the same court, it was held that a contract to perform labor upon a building which the employer does not own at the time of the contract, but which is conveyed to him before the work is begun, subjects the estate to a lien, if the work is afterwards done by the employer's consent, and while he is owner.<sup>3</sup> In another State, where it was enacted that "any person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting or repairing any building . . . shall have a lien upon the land for the amount due to him for such labor or materials," etc., a mechanics' lien will not extend over land or lots not owned at the time by the party for whom the building was constructed. In the absence of suggestion of fraud, if a contract be made for building a house with a party who is not the owner of the lot, it will not give a lien either upon the lot or the house, nor will the removal of the house to a lot that is owned transfer the lien to the same. As where a contract is made to build a house on a lot which is not owned by the party building, but which is enclosed by a common fence with two other lots owned by him, there is no lien on either the house or lot on which it is erected, nor will the transfer of the house to the other lots give a contractor a lien on them as against a *bona fide* purchaser. To enforce a lien upon

<sup>1</sup> Howard v. Veazie, 3 Gray (Mass.), 233.

<sup>2</sup> Hayes v. Fessenden, 106 Mass. 228.

<sup>3</sup> Corbett v. Greenlaw, 117 Mass. 167.



them under such circumstances would be productive of frauds and great hardships upon innocent purchasers. The contractor was guilty of negligence in not making inquiry into the ownership, if he desired a lien, before he performed the labor.<sup>1</sup> On the other hand, it has been decided, under a New York statute, that if the equitable owner erect or permit a building to be erected, and, before lien filed, by the performance of a contract of purchase, becomes the legal owner, the conveyance will be held to relate to the time when the contract of purchase was made, and such owner to be within the statute.<sup>2</sup> So, although a contract with the holder of the equitable title will not bind the legal owner, still, if the former acquires the legal title, both estates will be bound.<sup>3</sup> Where an individual had the privilege to build a house on the land of another, and then employed a mechanic to erect it for him, and, before petition filed to enforce the lien, bought it in the name of his wife, but with his own funds, the conveyance was voluntary as against the mechanic, and the land became subject to the lien of the mechanic.<sup>4</sup> A party, who, pending an injunction sued out by himself to restrain a mechanics' lien, obtains a tax title to the property upon which the lien is sought, is thereby guilty of attempting an unconscientious advantage, and will not be allowed to use his tax title to defeat the lien. The tax title must enure to the benefit of the parties.<sup>5</sup> In general a builders' lien does not attach to any interest which the defendant did not have at the time the materials began to be furnished.<sup>6</sup> By express agreement for a lien, one who contemplates the purchase of property may create an equity that will attach to the land as soon as he acquires it.<sup>7</sup> Where materials were furnished to A. and B. jointly, for the erection of a house on C.'s lot, and B. afterward acquired full title to lot and building, it was held that the lien attached to the house and lot entire.<sup>8</sup> Where A. leased land to B., who erected a building and then sold the leasehold to A., who had knowledge of the plaintiff's lien rights, and the leasehold was of greater value than the lien, the estates merged and the whole fee was subject to the lien.<sup>9</sup> A mechanics' lien attaches only to the estate of the person for whom the building is erected; and, where materials are furnished for the owner of an equitable

<sup>1</sup> *Underhill v. Corwin*, 15 Ill. 556.

<sup>2</sup> *Rollin v. Cross*, 45 N. Y. 767.

<sup>3</sup> *McGraw v. Godfrey*, 16 Abb. Pr. N. S. (N. Y.) 358.

<sup>4</sup> *Hooker v. McGlone*, 42 Conn. 96.

<sup>5</sup> *McLaughlin v. Green*, 48 Miss. 175.

<sup>6</sup> [*Sisson v. Holcomb*, 58 Mich. 634, 636.]

<sup>7</sup> [*Taylor v. Huck & Co.*, 65 Tex. 238, 242; *Mitchell v. Winslow*, 2 Story, 630.]

<sup>8</sup> [*Colman v. Goodnow*, 36 Minn. 9.]

<sup>9</sup> [*Evans v. Young*, 10 Colo. 316, 324.]

estate only, and a claim is filed against the owner of the legal title by subsequent purchase, it cannot be sustained without evidence that the defendant owns also the interest of the person for whom the building was erected.<sup>1</sup>

§ 75. **Owner by Estoppel.** — Wherever the owner of land is guilty of fraud upon the mechanic, who is deceived thereby, an estoppel *in pais* arises as in other cases, and he will not be allowed either to deny the ostensible ownership of the party at whose instance the building was erected, or to assert inconsistent rights of property in himself. As, for example, where the owner of land stands by and suffers credit to be given to another on the supposition that he owns the land, and aids in creating a belief that such other person does own the land, he cannot afterwards defeat a mechanics' lien by insisting that the land is his own. The principles of equity clearly estop him from so doing. He is bound by his representations, and answerable for all the consequences naturally flowing from them. There is no principle better established, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.<sup>2</sup> Again, the owner of a house in the course of erection contracted to sell it, and to have it completed like one adjoining. The vendee deposited a sum of money as a forfeit, upon his non-compliance with the contract. Pending the contract, the vendee purchased of the lien claimant a range, furnace, and other articles, which were delivered upon the premises with the knowledge of the owner, the furnace and range being bricked up in the cellar. Subsequently the vendee abandoned the contract, and refused to take the house; the owner retained the forfeit money, and with it the house and fixtures in question. On a *scire facias* by the claimant to enforce a mechanics' lien against the house for the articles furnished by him, it was held that the articles must be considered as furnished under the authority of the owner of the house, and he was estopped by his own conduct from disputing the demand; and, further, that the adoption by the owner of the acts of the vendee, permitting the articles to be attached to

<sup>1</sup> [Weaver v. Sheeler, 118 Pa. 634.]

<sup>2</sup> Higgins v. Ferguson, 14 Ill. 269.

the house, without objection, made the house answerable for the same, and created a lien on the property for its payment.<sup>1</sup> So, if a party, or the president of a company which is the owner of a lot, draw up the contract for work to be performed on it, without disclosing its title, the party or company is estopped from setting up his or its title.<sup>2</sup> On a petition, it appeared that the respondent agreed to convey land to a person on condition that the latter should build upon the land within a certain time, and who contracted with a mechanic to build a cellar wall warranted to stand. The wall was completed, but afterwards injured by frost, and was repaired by the petitioner after his employer's authority to bind respondent had ceased. The petitioner filed his statement after the time allowed, counting from the completion of the wall, but within the period after he made the repairs; it was held that if he made the repairs without the authority of the respondent, he could not enforce his lien; otherwise, if he acted in good faith to fulfil his warranty, at the request of the respondent, the latter having knowledge of the terms of the contract.<sup>3</sup> Where one conveys the fee of an estate, the deed of which is recorded, and receives a bond to reconvey on certain conditions, which is not recorded, he will not, after standing silently by and seeing the work progress, be allowed either to defeat the lien or diminish his grantee's estate by the production of the unrecorded deed.<sup>4</sup> But the fact that a son of the party contracting for the building of a house passed through the yard, and by the door of the house, while the work was going on, and saw one of the mechanics at work there, is not such evidence of his request for the doing of such work, as will subject the son's interest in the estate to a mechanics' lien for the price of the work.<sup>5</sup> If there is no fraudulent inducing of a belief as to ownership, but only a fraud of the owner on some other point, — the credit of the person having the work done, for example, — no lien will exist at least as against a *bona fide* purchaser. Where E. contracted with B. believing B. the owner, and afterward W. (ascertained to be the real owner), by fraudulent representations as to B.'s financial condition, induces E. to complete the contract, and take B.'s notes as agreed, B. has only his suit for damages against W. for his deceit; he cannot claim a lien on the property on the ground of an implied contract on W.'s

<sup>1</sup> Weber v. Weatherby, 34 Md. 656.

<sup>2</sup> Donaldson v. Holmes, 23 Ill. 85.

<sup>3</sup> Worthen v. Cleaveland, 129 Mass.

<sup>4</sup> Mellor v. Valentine, 3 Colo. 255.

<sup>5</sup> Bliss v. Patten, 5 R. I. 380.

part to pay for the labor and materials.<sup>1</sup> I believe this decision to be unjust as to W., — it enables him to take advantage of his own wrong and gain improvements on his land through deceit when he knows the workman will never get his pay, — but as to a *bona fide* purchaser from W. it was probably right, and that was all the facts called for.

§ 76. **Facts necessary to constitute Estoppel.** — To create this estoppel, however, there must always be knowledge, on the part of the person to be estopped, of the acts out of which it is to arise, otherwise the most serious frauds might themselves be perpetrated under a rule established for its prevention, and men, without their knowledge or consent, be stripped of their estates. Knowledge of a fact, concerning the business or affairs of a corporation, acquired by a director or other agent, unless acquired in the management and conduct of its business, does not constitute notice to the corporation. Accordingly, in an action against a corporation and its tenant to foreclose a mechanics' lien, for materials furnished in the construction of a building by the tenant on the leased premises, and alleged to have been furnished with the knowledge of the corporation, where it appeared that a director of the corporation, on one occasion, was present during the construction of the building, it was held to be no notice to the corporation.<sup>2</sup> So, where a contract is made by a person to erect a building upon premises which belonged to another, and such contract is made without the knowledge or authority of the owner, he is not estopped from subsequently asserting his title thereto; and the fact that such owner, after its completion, receives the rents and profits therefrom does not amount to a ratification of such contract, so as to create a lien upon the premises. But if he had known that the building was being erected under a contract made in his name by a person claiming authority to bind him, and had permitted the contractor to proceed under that belief, a very different question would be presented.<sup>3</sup> Where one is employed to work for a firm in the erection of a building, and continues to work under the direction of the partners, or one of them, supposing himself to be engaged during the whole time in the service of the firm, and having no intimation to the contrary, the fact that part of his labor was employed in the preparation of materials really belonging to one partner, some of which were not ultimately used for any partnership purpose, will not relieve the firm from lia-

<sup>1</sup> [Ellenwood v. Burgess, 144 Mass. 534.]

<sup>2</sup> Lothian v. Wood, 55 Cal. 159.

<sup>3</sup> McCarty v. Carter, 49 Ill. 53.

bility to him for the whole of such labor, nor prevent his having a lien on the building for the whole amount.<sup>1</sup> Again, where the owner of land stated to a house-builder that he had leased certain premises to a third party, and the builder thereafter erected a hotel on said ground, with the knowledge of the owner and without objection on his part, but on the contrary it appeared that the owner furnished said lessee with money to aid in erecting the hotel, and the lease was manifestly given with a view to such improvement; these facts, whether the lease was delivered or not, would estop the lessor from denying the delivery; and it seems that the fact that the owner some months after the commencement of the building, and when the lessee's responsibility became questionable, took from him a written surrender of the lease, would also estop him from asserting its non-delivery.<sup>2</sup> To prove this knowledge on the part of the owner, all the circumstances of the case are admissible in evidence, which may legitimately tend to bring the fact of building on the land to the attention of its owner. But no inflexible rule can be laid down on this subject, any more than in others, as to the sufficiency of its proof. What might fairly establish it in one instance would utterly fail in another. An illustration of this point may be found where a man upward of ninety-seven years old, who had not acted in the affairs of a religious society for many years, the legal title of whose property was in his name, and which had made a contract to erect a meeting-house thereon; the fact that he lived within a quarter of a mile of the building, and in sight of its erection, would not prove that he knew the society was making any contract to create a charge upon the trust estate, much less that he consented to it; and this intendment could not be helped by any disposition to construe the statute liberally in consideration of its beneficent intention. Parties who desire to avail themselves of its provisions should take care to inform themselves with whose estates they are dealing when they make their contracts.<sup>3</sup> Where sub-contractors have a lien, but their aggregate "shall not exceed the price stipulated in the original contract between the owner and the original contractor," if the owner of a building, when called on by a sub-contractor to state the original contract, neglects to do so, but promises to see him paid for his work, which is performed on the faith of such assurance, such owner will be estopped from setting up as against the sub-contractor a provision in the contract for payment in land,

<sup>1</sup> *Spruhen v. Stout*, 52 Wis. 517.

<sup>2</sup> *Allen v. Sales*, 56 Mo. 28.

<sup>3</sup> *Peabody v. East M. S. in Lynn*, 5 Allen (Mass.), 540.

or from setting up that the principal contractor had been fully paid.<sup>1</sup> But, where the representation could not have misled a mechanic, or induced him to perform labor on the faith of it, no lien will arise by estoppel.<sup>2</sup>

§ 77. **Joint Tenants and Tenants in Common.** — The right of joint tenants and tenants in common of real estate to charge their co-tenants' interest with a lien for repairs and improvements has also received some consideration from the courts. It may be regarded as a general rule that a co-tenant who makes advances and payments beyond his proportion towards the erection of buildings upon the property held in common, will not thereby acquire an equitable lien upon the property, unless there is an express agreement to that effect, or there are some special circumstances giving to such party peculiar equities, as fraud or a petition for partition by the non-paying tenant; and these circumstances must be shown by the party asserting the lien. No man has a right to improve the property of another against his consent, and charge him with the expenses. Perhaps a joint owner may repair and preserve property at the expense of all the owners and without their consent, especially if such consent is unreasonably withheld. But this is all that he can do. He cannot improve the property.<sup>3</sup> The law does not give one co-tenant an implied authority to improve real property at the expense of his co-tenants, and the lien will attach only to the interest of the co-tenant authorizing the improvement.<sup>4</sup> It has, however, been repeatedly held that a parol partition between tenants in common, accompanied by actual possession in accordance therewith, will bind the parties and those claiming through or from them. And where, after such a partition has been made, the parties take separate possession of their respective portions, and one of them contracts with a mechanic to erect a dwelling-house on his part, which is built accordingly, the interest of the party so contracting is of such a nature as to make it the subject of a lien under a law which gives "the owner" the right to contract, although the title to the whole lot is in the co-tenant. But the co-tenant who is not a party to the contract with the mechanic, and who has no interest in the work done, is not liable under the contract, nor is his share of the property subject to the builder's lien.<sup>5</sup> One joint tenant, however, may

<sup>1</sup> Welch v. Sherer, 93 Ill. 64.

<sup>2</sup> Rothberger v. Dupuy, 64 Ill. 452.

<sup>3</sup> Taylor v. Baldwin, 10 Barb. (N. Y.)

<sup>4</sup> [Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 83, citing Phillips, § 77.]

<sup>5</sup> Otis v. Cusack, 43 Barb. (N. Y.) 546; Mount v. Morton, 20 Barb. (N. Y.) 124.

create a lien in favor of a mechanic on his own interest in land.<sup>1</sup> So, although the contract is to be made with the "owner," yet, if but one of several persons who purchase materials for building own the land, the lien will be good against his interest.<sup>2</sup> The fact that a contract for repairs is made with several does not affect the lien, if one of the parties is the owner.<sup>3</sup> A lien for materials furnished upon a joint contract with a co-partnership will bind the interest of one of such parties who alone has title to the real estate upon which the building was erected.<sup>4</sup> So where materials are furnished on the contract of one tenant in common, in possession, a lien can be entered against him as owner of the premises, and judgment had which will bind his interest.<sup>5</sup>

§ 78. **Owners of Adjoining Property.** — Unless required by statute, there is no duty or obligation on the owners of adjoining building lots in a city to unite in building a party-wall on the dividing line of such lots. By the common law, every owner of land is his own judge of the propriety of building upon it or leaving it vacant, and, when he does build, of the manner and extent of his buildings. In the absence of statutory provisions, he may build with what material he pleases; and he is under no obligation to give to his neighbor any use or advantage of his land, by way of support, drip, or easement of any description. If a stranger dispossess him, or enter upon his unoccupied property, erect buildings, and make valuable permanent improvements upon it, he is not under the slightest obligation to recompense such stranger for any portion of the expense, on recovering the possession of the land. Whether the entry were tortious or in the most perfect good faith, the common law is uniform in refusing to permit the real owner of land to be benefited without his own request or sanction. So that if the owner of a city lot, on building upon it, place half of the wall upon the adjoining lot, the owner of the latter, in the absence of statutory obligation, is not liable to contribute towards the expense of the wall upon his subsequently using in his own erection the part of the wall which stands upon his own land. There is no lien for the expense of building a party-wall against one who buys the tenement resting upon such wall without notice of the lien; and the fact that one half of the wall stands upon the adjoining lot is not notice

<sup>1</sup> *Hillburn v. O'Barr*, 19 Ga. 591.

<sup>2</sup> *Van Court v. Bushnell*, 21 Ill. 624; (*D. C.*), 481.

affirmed in *Roach v. Chapin*, 27 Ill. 196.

<sup>3</sup> *Mellor v. Valentine*, 3 Colo. 255.

<sup>4</sup> *Smith v. Johnson*, 2 MacArthur

<sup>5</sup> *Keller v. Denmead*, 68 Penn. 449.

of any lien for the cost of its erection in favor of the neighboring owner who erected it. And where an act provided expressly that the first builder should be "reimbursed one moiety of the wall, or of so much of it as the next builder should use," the first builder had no lien for this reimbursement upon the adjoining land; it was only a personal charge.<sup>1</sup>

§ 79. **Agents.** — The general principles relating to the performance of acts by means of agents apply to mechanics' lien laws. There is no doubt a lien may be created as effectively upon the property of an owner by the act of his duly authorized agent, as by the proprietor himself; and when the authority is once duly established, all the consequences flow alike in either case. Indeed, almost all the statutes expressly vest in an agent the power to enter into such building contracts from which the lien is to arise. The main questions which have called for adjudication relate to the creation of the agency, rather than to the ability to act when expressly empowered. A general agency to take care of property, or an agency for other purposes, will not be sufficient. In this there is no hardship, as the title being on record, the mechanic is chargeable with notice that the agent is not the owner, and, having that notice while dealing with a person not having the title or being clothed with the evidences of title, he should ascertain the source and extent of the authority before contracting, and, failing to do so, he should bear the consequences of his negligence. Merely proving that a party is agent for some purpose will not be sufficient, nor proof that he was in possession of the property. A party in possession of property of another by contract may bind his own interest, but not that of the owner, in the premises, unless the authority to do so has been conferred. Nor will the mere fact that a party is in possession prove authority. If such were the law, a mere occupant could do great wrong to the owner. As this lien is a special one, in favor of a special class, it is but reasonable that those who claim it should be required to know, when they contract, that the person with whom they contract has power to create it so as to bind the property.<sup>2</sup> As where a petition for a mechanics' lien alleged that the son of a widow, who was the owner of a mill, contracted for machinery to place therein as well for himself as for his mother, with her knowledge and consent as her agent, this is a sufficient allegation of agency. But to succeed, it must be proved that the son had

<sup>1</sup> *Sherred v. Cisco*, 4 Sandf. 486; *Ingles v. Bringham*, 1 Dall. 341.

<sup>2</sup> Cited with approbation in *Leismann v. Lovely*, 45 Wis. 422.



authority from the mother to make the contract.<sup>1</sup> A statute may, however, so provide, as we have already seen in the preceding chapter, that the employment of a contractor shall be deemed the creation of an agency to the extent of rendering the building liable to a lien for the payment of the labor and material incorporated in it. As where a statute provided that "every mechanic or other person doing or performing any work or furnishing any materials for buildings shall have a lien for the same," in contemplation of law the owner of the building, by employing a person to do the work, thereby clothes him with authority not to bind him individually and to an unlimited extent, as an ordinary agent might do, but so far as the procuring of materials and labor may be necessary to complete his contract. He can make no contract that would confer a personal obligation upon his principal, but might bind the building whenever the steps pointed out by the law, and necessary to create this obligation, are properly taken.<sup>2</sup> Prices agreed upon between the latter and a material-man are therefore not binding upon the owner. As against him only the market value of the materials can be recovered. The agreed prices will, however, be received as *prima facie* evidence of the market value.<sup>3</sup> Where the law does not give a lien to a material-man furnishing a contractor or sub-contractor with articles which are afterwards used in the erection of any building, such lien may nevertheless be acquired in pursuance of a contract with the agent of the owner, and it is immaterial that the contractor or sub-contractor is such agent.<sup>4</sup> In another case, it was held that where there is conflicting evidence as to the extent of an architect's authority to purchase materials for a building over which he had charge, it is not proper to instruct the jury that if they should find that the vendor at the time of the sale had reason to believe, from the acts of the parties, that the architect was authorized to purchase such materials, then the owner is liable.<sup>5</sup> Where the language of a statute was that the contract must be made with the "owner," and this word "includes any person who has an estate or interest in the land, and the lien shall extend to the whole of his estate or interest," in an action to establish a mechanics' lien for the erection of a house on certain real estate, the petition alleged that the contract was made with W., acting for himself and the other defendants, the latter being the owners of

<sup>1</sup> Baxter v. Hutchins, 49 Ill. 116.

<sup>2</sup> Morrison v. Hancock, 40 Mo. 561;  
Deardorff v. Everhartt, 74 Mo. 37.

<sup>3</sup> Deardorff v. Everhartt, 74 Mo. 37.

<sup>4</sup> Blake v. Pitcher, 46 Md. 454.

<sup>5</sup> McDonnell v. Dodge, 10 Wis. 106.

the lot; and where W. failed to answer, and the other defendants answered that they were the exclusive owners of the lot, that W. had no interest therein, and this fact was well known to the plaintiff at the time he made the contract with W., and that W., if he made any such contract, acted without their knowledge or consent, and did not make the contract in their behalf, to which answer there was no replication; and where no evidence was introduced, and the cause was submitted to the court on the pleadings, — no judgment was authorized against the house, because, though W. made the contract, he was not the owner of the lot, and had no interest in it, and no judgment could be rendered against the house as distinct from the ground on which it stood; it belonged to the owner of the lot.<sup>1</sup> Where the question is whether a party acted as agent, all the facts and transactions of the parties should be admitted. The testimony of the agent is not conclusive that he was such. Evidence of the statements of the agent inconsistent with his alleged agency and testimony are admissible to impeach his credibility.<sup>2</sup> Where B. agrees with R. to build a house on R.'s land, toward which R. is to pay \$200, and B. the rest, taking his compensation by occupying the house, B. is not the agent of R., but an original contractor, and a material-man cannot hold R. as a principal, but must give R. the notice required from sub-contractors.<sup>3</sup> Where, prior to recording their certificate of organization, the subscribers of an incorporated company contract with one of their number I., for a building for corporate purposes, and I. sublets the contract to M., the subscribers contributing to the building in proportion to their stock, I. acts as agent for the subscribers, and M. has a lien on the entire property.<sup>4</sup> A purchaser on credit is not the agent or sub-contractor of the owner.<sup>5</sup> If a pump is sold to an agent A., in charge of water-works to be used in the said works, and is so used, the owners will be held affected by a lien, though nothing was said as to A.'s acting for any one but himself. From his position as manager authority to make such purchase will be presumed.<sup>6</sup> One who knows that his son is having improvements made on his property cannot deny that the son acted with authority so as to defeat the mechanics' lien.<sup>7</sup> A custom to charge mill-owners with machinery ordered by contractors will not affect said owners unless they knew of the cus-

<sup>1</sup> Redman v. Williamson, 2 Iowa, 488.

<sup>2</sup> Owens v. Northup, 30 Wis. 482.

<sup>3</sup> Kinney v. Blackmer, 55 Conn. 261.]

<sup>4</sup> [McFall v. Ice Co., 123 Pa. 253.]

<sup>5</sup> [Hill v. Callahan, 58 N. H. 497.]

<sup>6</sup> [Goss v. Helbing, 77 Cal. 190.]

<sup>7</sup> [Cannon v. Helfrick, 99 Ind. 164, 167.]

tom, and contracted with reference to it.<sup>1</sup> The principles of agency relative to limiting the claim against an undisclosed principal to the limits of the agent's authority are said not to apply to the case of a lien for materials furnished at the request of an agent who exceeds his authority as to amount of money to be spent.<sup>2</sup> It is doubtful, however, if this dictum is good law; the statute gives a lien for materials furnished the owner, or "some person having authority from or rightfully acting for such owner," and this does not cover one acting beyond his authority.

§ 80. **Trustees, Corporators, and Committee-men.** — Important questions have also arisen when parties have acted in the representative capacity of trustee, commissioner, or corporator, as to how far, under a law providing for the contract to be made with "the owner or his agent," the mechanic may fasten the lien upon the edifice he has contributed to erect. Under a statute which provided that "any person who, by virtue of any contract with the owner thereof, or his agent, etc., shall, in conformity with the terms of such contract, perform any labor," etc., in a lien proceeding for work on a public school building in the city of New York, the ward school officers who select the site, and contract for the building, the board of education, under whose direction the school officers act in so doing, and who pay for the building, and the mayor, aldermen, and commonalty of the city, who use the building, — were all held to be proper parties, to be joined as "owner" of the building within the meaning of the statute, as these three bodies have distributed between them all the rights and powers which an owner can possess, and may therefore be regarded collectively as the owner. The building may be said to be erected for the three bodies. It does not follow because the title to the school-house is vested by law in the mayor, aldermen, and commonalty, that they alone must be deemed, for the purpose of the lien law, the owners. For, the board of education giving their approbation, the mayor, etc., having the title and the reversionary right to its use, constitute thus conjointly an ordinary owner. There is therefore no reason why a sub-contractor in such case should not be subrogated to the rights of the first contractor, where the parties for whom a building was erected have obtained the benefit of the work and labor which the claimant has bestowed upon the building in the course of its erection, and where one of them has still in his

<sup>1</sup> [Stout v. McLachlin, 38 Kans. 120.]

<sup>2</sup> [Paine v. Tillinghast, 52 Conn. 533, 539.]

hands moneys to which the first contractor would be otherwise entitled; and the sub-contractor was held entitled to recover, where the contract had been made with the school officers of the ward, who had authority under law to make the improvement, though it was not also signed by the mayor, etc., in whom the title was vested.<sup>1</sup> So where the law was that "any person to whom a debt is due for labor performed or furnished . . . in the erection of any building or structure upon real estate by virtue of an agreement with, or by consent of, the owner of such building, or any person having authority from or rightfully acting for such owner, shall have a lien," etc., work done in enlarging a school-house under a written contract with a building committee chosen by the district, with instructions "to proceed forthwith to complete the work which is on their hands," although by the terms of the contract the committee were personally responsible therefor, yet they stood in the character of owners to the contractors, and a lien existed for the work performed; and it was immaterial whether the acts of the committee were subsequently ratified by the district at a legal meeting.<sup>2</sup> Again, a township trustee is a sufficient "owner" to create a valid contract for the erection of a public school-house, and thus subject it to the lien.<sup>3</sup> A contractor for the erection of a meeting-house for an ecclesiastical society applied for labor and materials to C., D., and E., who had previously subscribed certain sums towards the cost of said house, and agreed that the society might pay them therefor, by applying the amount of their subscriptions thereto, and, in case the amount so furnished should exceed their subscriptions, such excess should be paid in cash by the society; which cash and subscriptions cancelled were to be charged by the society to such contractor, as payment upon said contract. This agreement was made known to the society, and assented to in their behalf by their building committee in the exercise of the powers given them by the society; and, relying on the same, C., D., and E. furnished labor and materials accordingly. Such agreement was not void as to the society, on the ground that the building committee had no power to assent to it on their behalf, the facts showing power; nor upon the ground that it was a promise to pay the debt of another, and therefore not within the statute of frauds, it being a promise to

<sup>1</sup> *McMahon v. Tenth Ward School Officers of New York*, 12 Abb. (N. Y.) Pr. 129. *Caldwell Institute v. Young*, 2 Duv. (Ky.) 582.

<sup>2</sup> *Morse v. School District No. 7 in Newbury*, 3 Allen (Mass.), 307; Trustees *Shattell v. Woodward*, 17 Ind. 225; *Board of Education v. Greenbaum*, 39 Ill. 610.

pay their own debt; nor void, for want of consideration.<sup>1</sup> A trustee with power to build may make contracts, and the statutory incident of a mechanics' lien is implied.<sup>2</sup> Trustees "to receive and pay over profits above all necessary expenses" have power to contract for repairs and create a lien for them.<sup>3</sup> A trustee having the control and management of an estate can make necessary repairs and incur other expenditures requisite for the protection of the property; but he cannot, unless authorized in the instrument creating the trust, make large and expensive improvements. And where such a trustee erected a new and large building in the place of an old one, it was held that no liens could be sustained against it for the building.<sup>4</sup> Again, a trustee without any authority to build or contract, cannot create a lien on the property.<sup>5</sup> On a building contract executed by trustees under a will, the trustees are personally liable to the contractor when it is regarded as a personal contract, and not binding the estate.<sup>6</sup> In reference to corporations, a contract with the president of a railroad company is the contract of the company within the lien law.<sup>7</sup> So, in a case where a contract was executed on the part of a board of education, a corporation, by certain persons named, who were the building committee of the board and who had full authority to contract, it was held that the board might act thus by agent. The old doctrine that corporations can only be bound by acts under their corporate seals has long been exploded, and, as said by the Supreme Court of the United States,<sup>8</sup> cannot now, as a general proposition, be supported. In general, throughout the United States, it is well settled that the acts of a corporation evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may be bound as well by express promises through its authorized agents, as by deed, and that express promises may as well be implied from its acts and the acts of its agents as if it had been an individual.<sup>9</sup> One who does work under order of a society assembled as a congregation with the knowledge of the defendant trustees, is entitled to a

<sup>1</sup> *Consociated Presb. Soc. v. Staples*, 23 Conn. 544.

<sup>2</sup> *Taylor v. Gillsdorff*, 74 Ill. 354.

<sup>3</sup> [*Cheatman v. Rowland*, 92 N. C. 340, 343.]

<sup>4</sup> *Herbert v. Herbert*, 57 How. Pr. (N. Y.) 333.

<sup>5</sup> *Meyers v. Bennett*, 7 Daly (N. Y.), 476.

<sup>6</sup> *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y.) 356.

<sup>7</sup> *Hearne v. Chillicothe*, 53 Mo. 324.

<sup>8</sup> *Bank of the United States v. Danbridge*, 12 Wheat. 68.

<sup>9</sup> *Board of Education v. Greenbaum*, 39 Ill. 610.

lien, although he knew that voluntary contributions were relied upon for means of paying him.<sup>1</sup> Where a recorded trust deed authorizes the trustee to make improvements "provided always there shall be no lien or incumbrance on the premises," all persons are bound to know that no lien can be put on the premises, and even the destruction of records has no effect on this constructive notice.<sup>2</sup>

§ 81. **Owners of any Appreciable Interest.**<sup>3</sup>—What has been said in regard to ownership in fee-simple may be equally affirmed of parties holding any appreciable interest in property. It is indispensable, however, that the party with whom the contract is made shall have some interest in the land upon which the building is to be erected. This interest may be a fee simple, an estate for life, or it may be any estate less than a fee.<sup>4</sup> They are as to that interest "owners," and therefore come within the terms of those laws which give mechanics and others liens upon contracts made with "owners." Thus, where a statute provides that "any person who shall, by contract with the owner of any piece of land, etc., furnish labor, etc., shall have a lien," etc., a person holding a less estate than the fee, as a husband holding an estate acquired by marriage, is considered as "owner."<sup>5</sup> And in another case where the law was that there should be a "lien for the payment of what may be due from the proprietor," a husband with a life estate in his wife's lands was held to be a "proprietor."<sup>6</sup> A widow after assignment of dower may charge her land with this lien, but before assignment she has no such interest as owner that will enable her to create it.<sup>7</sup>

§ 82. **Trespassers and Others.**—Contracts made with mere trespassers, or with persons having no title to the land, do not secure liens.<sup>8</sup> Materials furnished to a stranger give no lien.<sup>9</sup> It is well settled that if a party for whom work is done has an interest in a building only as personal property, the owner of the land never having consented to or authorized such work thereon, no lien can attach thereto, where the statute does not authorize a severance of the building from the land. Therefore where a town built a school-house partly upon its own land and partly upon land to which it had no title, there was no lien upon

<sup>1</sup> [Gortemiller v. Rosengarn, 103 Ind. 414, 418.]

<sup>2</sup> [Franklin Savs. Bk. v. Taylor, 131 Ill. 376, 386.]

<sup>3</sup> [This section approved in Mortgage Trust Co. v. Sutton, 46 Kans. 166, 169.]

<sup>4</sup> Tracy v. Rogers, 69 Ill. 662.

<sup>5</sup> McCarty v. Carter, 49 Ill. 53; Butler v. Rivers, 4 R. I. 38.

<sup>6</sup> Fitch v. Baker, 23 Conn. 563.

<sup>7</sup> Ermul v. Kullok, 3 Kan. 500.

<sup>8</sup> Harlan v. Rand, 27 Penn. 511.

<sup>9</sup> Ogg v. Tate, 52 Ind. 159.

the land to which the town had no title, or upon that part of the building covering it, and if there could be a lien upon the remainder, it could only be for work there done.<sup>1</sup> And where the language of the statute is that the contract must be made with the "owner," and this word "includes any person who has an estate or interest in the land, and the lien extends to the whole of his estate or interest," it has been held that a contract made with a person having no title or interest in the land would not support the lien.<sup>2</sup> One cannot at the time of contracting for building material, and by that act alone, incur a lien against land upon which the building is to be put up, if he had then no legal or equitable title to it.<sup>3</sup> A mere possession, without right or interest to or in the realty, is not sufficient.<sup>4</sup> One supplying materials to a person in possession, but without interest in the land, has no lien.<sup>5</sup> If A. furnishes materials for a house to B., tenant at sufferance, A. knowing that B. is not the owner, and the owner C. not knowing of the improvement, A. will have no lien on the property.<sup>6</sup> But as against the party who is in possession of, and exercising acts of ownership over the property, he is *prima facie* such an owner as will subject his interest therein to the lien, and cannot demand that the extent of his title be proved.<sup>7</sup> A lien upon *improvements* may exist by contract with the owner of the improvements. And one A., who wrongfully makes improvements on land of another, B., cannot set up his trespass to defeat the mechanics' lien of the workman; neither can the assignee of A. make such defence.<sup>8</sup> But "when any contract shall hereafter be made in writing, between the proprietor of land on the one part, and any person on the other part, for erecting, . . . the person erecting . . . shall have a lien," a contract made by a mechanic with a person in possession of land as a mere intruder does not create a lien on the land and building erected in pursuance of such contract, as against the owner of the land.<sup>9</sup> So, if a mechanic performs labor upon a building in the temporary use of the party employing him, but which belongs to a third party, the statute gives no lien.<sup>10</sup> On the other hand, however, where it was provided "that if the person who procures the work to be done, or materials

<sup>1</sup> Stevens v. Lincoln, 114 Mass. 476.

<sup>2</sup> Redman v. Williamson, 2 Iowa, 488.

<sup>3</sup> Wagar v. Briscoe, 38 Mich. 587.

<sup>4</sup> Monroe v. West, 12 Iowa, 119.

<sup>5</sup> [Wilkins v. Litchfield, 69 Iowa, 465.]

<sup>6</sup> [Proctor v. Tows, 115 Ill. 138. (B. was C.'s agent to buy the lot, but had no authority to build on it.)]

<sup>7</sup> [Chambers v. Benoist, 25 Mo. App. 520. See further on possession, § 113.]

<sup>8</sup> [Lane v. Snow, 66 Iowa, 544.]

<sup>9</sup> Thaxter v. Williams, 14 Pick. (Mass.)

49.

<sup>10</sup> Tracy v. Rogers, 69 Ill. 662; Woodburn v. Gifford, 66 Ill. 285.

furnished, has an estate for life only, or any other estate, less than a fee-simple, . . . the person who procures the work or materials shall be considered the owner to the extent of his right and interest in the premises," in a proceeding against a party in possession, though he should not be the owner, the land may be sold, and the purchaser will take the title as against him; and whatever interest he had in the land will vest in the purchaser.<sup>1</sup> But where "the lien of the mechanic shall not be construed to extend to any other or greater estate in the ground on which any building may be erected than that of the person in possession at the time of commencing the said building, and at whose instance the same is erected," a house rebuilt by an insurance company in discharge of its liability upon a policy, is not liable to a lien for materials furnished to the contractor, as the transaction is an affair of the company, and not of the insured, who has nothing to do with it. The actual builder, at whose instance the lumber is furnished, is the agent of the company, and not of the insured, who is a stranger to the matter, and not to be affected by it. When a party furnishes, at the instance of a contractor, materials or labor to a building on a stranger's ground, it concerns him to provide for his security by the terms of his bargain.<sup>2</sup> So if an administrator has charge of the personal effects only of his intestate, he cannot, by his contract with a builder, bind the estate to pay for mechanical labor or materials for a house.<sup>3</sup> Where B., owning lot 5, gets material from C., and by mistake builds on lot 6, belonging to D., C. has no lien either on lot 5 nor on the building as against D. or a third party vendee.<sup>4</sup> But the mere fact that part of a building extends over the boundary of the owner's lot will not, of itself, deprive the claimant of his lien for work done or materials furnished on that part of the building.<sup>5</sup>

<sup>1</sup> Steigleman v. McBride, 17 Ill. 300.

<sup>4</sup> [Smith v. Barnes, 38 Minn. 240.]

<sup>2</sup> Bruner v. Sheik, 9 W. & S. 119.

<sup>5</sup> [Pullis v. Hoffman, 28 Mo. App.

<sup>3</sup> Weathersby v. Sinclair, 43 Miss. 189. 666.]



## CHAPTER IX.

## LESSEES.

§ 83. **Owners of Estates less than Fee-simple.** — Lessees and others owning interests in lands less than the fee-simple estate are, unless the contrary intention is expressed in the statute authorizing the lien, deemed “owners” to the extent of that interest. An “owner or proprietor” is he who has dominion of a thing.<sup>1</sup> They are not legal terms, but words of common parlance. By “owner” is not necessarily meant a tenant in fee-simple; the word is most frequently used to express, generally, a person who receives beneficial returns from land. A tenant in fee-simple may have scarcely any beneficial interest in the land. The same observations apply to the term “proprietor.” Neither of the words has any necessary strict meaning.<sup>2</sup> A tenant for years has as complete dominion for use and enjoyment over the land leased, during his term, as has a tenant in fee. The estate is divided into term and reversion, and so is the ownership of the thing. The lessee is owner of the term as much as the lessor is of the reversion. There can be no reason against imposing upon the owner of a term the same responsibilities for improvements made for him that would be incurred by the owner of the fee in a like case. If the strict construction were adopted that a lessee is not an owner, then a tenant for ninety-nine or any number of years might be exempt from the lien of the mechanic for the most splendid and costly improvements, because he is not “owner.” This doctrine would very much arrest the progress of improvements, and check the spirit of enterprise in cities, as there is nothing more common than to grant leases for long terms, for the express purpose of the erection of houses for dwellings, or the business of tradesmen to be paid for by the use of the property. This mode of extending and improving cities would be seriously obstructed by a construction by which mechanics and material-men would be denied the benefit of a lien upon their work, as well as the term, for

<sup>1</sup> 2 Bouv. Law Dict. 276.

<sup>2</sup> *Lister v. Lobley*, 36 Eng. Com. L. R. 643.

compensation. These considerations would seem to require that a broader meaning should be given to the word "owner" than the ownership of the fee-simple, if it be susceptible of it by a fair interpretation of the whole statute, as it is not a technical word, so as to be tied up to any fixed and legal import. It was therefore held, where a lien was given upon "any lot of ground or tract of land, upon which a house has been constructed . . . by special contract with the owner or his agent in favor of the mechanic," that a person who had leased the same for a term of years, and erected a house on it, is the owner within the meaning of the statute, and his term may be sold.<sup>1</sup> So, under a law where the lien shall not "extend to any other or greater estate in the ground than that of the person in possession at the time of commencing said building, and at whose instance the same is erected," a mechanics' lien is sustainable against a leasehold interest.<sup>2</sup> The same word "owner," used in an English statute in relation to compensation for lands taken for public use was construed to apply as well to a term, as a fee. Both were held to be embraced by the words "owner or proprietor."<sup>3</sup> A statute provided that all liens in favor of the contractor should exist "to the extent, and only to the extent of all the right, title, and interest owned therein by the owner of such building for whose immediate use or benefit the labor was done or things were furnished:" held, that where improvements were made by a tenant on leased land, at the request and on the exclusive credit of the lessee, the contractor's lien extends not only to such improvements, but also to the unexpired leasehold. This principle, however, involves the necessary implication, that these materials, in order to authorize the enforcement of such lien on them specifically, must be capable of practical identification. This cannot be, where they are used merely for repairs, and are so merged in the freehold as to be incapable of severance.<sup>4</sup> In the Pennsylvania counties of Luzerne and Schuylkill where the act of Feb. 17, 1858, is in force, a mechanics' lien attaches to a leasehold interest for business improvements erected by the lessee. Such a lien applies to an estate at will, to an unincorporated company, and it is not impaired by the subsequent incorporation or putting the lease in writing.<sup>5</sup> In Montana it is expressly provided that the interests of proprietors in leased premises should not

<sup>1</sup> *Alley v. Lanier*, 1 Coldw. (Tenn.) 540.

<sup>2</sup> *Rush v. Fisher*, 8 Phila. 44.

<sup>3</sup> *Lister v. Lobley*, 36 Eng. Com. L. R. 641-644.

<sup>4</sup> [*Rothe v. Bellingrath*, 71 Ala. 55.]

<sup>5</sup> [*Mountain City Market House v. Kearns*, 103 Pa. St. 403.]

be subject to a lien for labor performed thereon for the use and benefit of tenants and lessees.<sup>1</sup> The fact that the buildings and fixtures are removable by the tenant at the end of the term, will not prevent the mechanic from having a lien on the leasehold under the provisions of the statute relating to liens on real property.<sup>2</sup> So in Indiana repairs for a lessee on a building he has a right to remove creates a lien on the building and on the term. That the house and the tenant's interest are both chattels makes no difference, for the statute clearly gives a lien on the interest of the tenant.<sup>3</sup> The Missouri law of 1879 extended to a building or improvement erected by a tenant on leased premises with power of removal, but did not extend to engines, boilers, or machinery erected by him thereon, unless the same were used in the construction of the building or improvement, or were afterward connected therewith and became part of the building itself for some permanent object, so as to go and pass with it as a constituent part thereof.<sup>4</sup>

§ 84. **Same.** — In another case arising under a mechanics' lien law, the term "owner" was held not to be limited in its meaning to an owner of the fee, but included also an owner of a leasehold estate; and it was said, to hold that an owner in fee only is meant would be directly subversive of the policy of these laws, and, in a great degree, render them useless.<sup>5</sup> So where the lien extended to persons employed by the "owner, agent, or superintendent," a tenant for the time being was the rightful owner, and could create the lien provided by the statute.<sup>6</sup> Some States have legislated upon this branch of the law, and by express enactment or by necessary implication declared who should be deemed owners. A sub-tenant erected a building upon demised premises, which he claimed the right to remove when his tenancy should cease; he was considered the "owner" of the building, within the meaning of a lien law which provided that "any person who shall, by virtue of any contract with the owner thereof, perform any labor, etc., upon such house or building, shall have a lien to the extent of the right, title, and interest at the time existing of such owner." This act does not require that the defendant in the proceedings under it shall necessarily be the absolute owner of the soil. If he, as tenant, may be con-

<sup>1</sup> [Pelton v. Minah Con. Min. Co., 11 Mont. 281, 285.]

<sup>2</sup> [Hathaway v. Davis, 32 Kans. 693, 697. See § 193.]

<sup>3</sup> [McCarty v. Burnet, 84 Ind. 24, 26.]

<sup>4</sup> [Richardson v. Koch, 81 Mo. 264, 269.]

<sup>5</sup> Choteau v. Thompson, 2 Ohio, 114; Butler v. Rivers, 4 R. I. 38; [Hathaway v. Davis, 32 Kans. 693, 696.]

<sup>6</sup> Harman v. Allen, 11 Ga. 45.

sidered as the general owner of the building, that would be sufficient. And where he erected a building upon land occupied by him as such sub-tenant, with the assent of the landlord, at his own expense, for his own use, and with the declared intent of removing it when his occupancy of the land should terminate, and although the foundation was to some extent imbedded in the earth, yet the building was not in any manner fastened to it nor to another building adjoining it, and it could be removed without doing any damage to the soil or to the other erection upon it, the building was the property of the sub-tenant, to the extent required by the statute to fasten a lien upon it for its erection.<sup>1</sup> So, notwithstanding a lessor makes advances to his lessee for the purpose of aiding the lessee to make improvements, which are to belong to the lessor at the expiration of the term, the lessor is not deemed the "owner," but the interest of the lessee is alone affected.<sup>2</sup> So if the law provide that the lien shall extend "to the interest of the employer,"<sup>3</sup> when the lien has once attached, a voluntary surrender of the lease to a landlord, before its expiration, cannot affect a mechanics' lien which accrued while the lessee was owner. The landlord, however, is entitled to the use of the property in such case. Where A. furnished fixtures to B., a lessee who surrendered his term to L., the landlord, the court refused to enjoin the latter from using the fixtures.<sup>4</sup> A lessee may not convey the leasehold estate free of the lien for improvements made by him, but it is not clear that the landlord could not enter for non-payment of rent and defeat the lien.<sup>5</sup> In Iowa, however, it has been decided that one furnishing materials for a dwelling on a leasehold with notice of a provision for forfeiture to the lessor in default of payments by the lessee, will hold his lien on the building in spite of the forfeiture.<sup>6</sup> A mechanic making repairs for a lessee may, in view of the intended cancellation of the lease by the owner for non-payment of rent, pay the rent, assume the lease, and assert his lien on the leasehold interest.<sup>7</sup> Where a mechanic has a lien against the interest of a lessee, and the lease has been forfeited, the holder of such lien before he can be placed in the shoes of the lessee, even by becoming the purchaser of the leasehold term

<sup>1</sup> *Ombony v. Jones*, 21 Barb. (N. Y.) 520; s. c. 5 Smith (N. Y.), 234.

<sup>2</sup> *Stuyvesant v. Browning*, 33 N. Y. Supr. Ct. 203.

<sup>3</sup> *Caldwell Institute v. Young*, 2 Duv. (Ky.) 582.

<sup>4</sup> [*Chamberlin v. McCarthy*, 59 Hun, 158.]

<sup>5</sup> [*Chamberlin v. McCarthy*, 59 Hun, 158, 160.]

<sup>6</sup> [*Oliver v. Davis*, 81 Iowa, 287.]

<sup>7</sup> [*Vanderbilt v. Williams*, 40 Ill. App. 298.]

and the improvements, must first pay to the lessor all arrears of rent, or other money, interest, and costs under the lease. At common law the burden of repairs was always cast on the tenant, and the landlord was under no implied obligation to keep rented premises in repair. The statute must be construed in harmony with this principle, so far as its letter will permit. It is clear, however, that between the mechanic and lessee it is immaterial what amount may be due or what damages may have accrued under the lease. These are important facts only as against the lessor.<sup>1</sup> The owner of the land, if the lease is sold under judicial proceedings, would be bound to accept another tenant.<sup>2</sup> Other cases illustrating this subject will be found in a subsequent chapter.<sup>3</sup>

§ 85. **When Lessees are not Owners.**—The legislature has, however, the right, in its discretion, to restrict this creation of lien by tenants; and whenever it is so expressed, the mechanic possesses no remedy, irrespective of the merits of his claim. As where a statute provided that the lien “shall only extend to work done or materials furnished on a contract entered into with the owner of any building for repairs, and not to any contract made with the tenant,” and, further, “that the building, with the interest of the employer in the land, shall be sold,” a tenant of a building could not subject it to a lien for repairs.<sup>4</sup> Again, where the statute declares that the lien shall not extend “to any contract made with the tenant, except only to the extent of his interest,” allegations that the landlord “was aware of and consented to” the improvements, that the same were made while the premises were occupied “free of rent” by the tenant, that the tenant, “with the knowledge, consent, and assistance of” the landlord, was making the improvements, will not make the landlord liable.<sup>5</sup> So buildings erected by a lessee for years, on ground leased to him, are not subject to a mechanics’ lien under a law which only declares that the lien shall “not extend to any other or greater estate in the ground on which any building may be erected than that of the person in possession at the time of commencing the said building, and at whose instance the same is erected.”<sup>6</sup> Under the same law it was again said that buildings erected by a tenant for years, on demised premises, for the accommodation of his business, are not subject to mechanics’

<sup>1</sup> [Rothe v. Bellingrath, 71 Ala. 55; Phillips, § 192, cited with approval, which see.]

<sup>2</sup> Dobschuetz v. Holliday, 82 Ill. 372.

<sup>3</sup> See *post*, ch. 15.

<sup>4</sup> Lynam v. King, 9 Ind. 3.

<sup>5</sup> Wilkerson v. Rust, 57 Ind. 172.

<sup>6</sup> Haworth v. Wallace, 14 Penn.St. 118.

liens. But where by the terms of the lease the tenant had a right to take a part of the demised premises in fee, on ground rent, at a stipulated sum, and before he exercised this right he erected certain buildings on the premises, he had such an equitable estate in the land as rendered the buildings liable.<sup>1</sup> And where a law which gave a lien upon the interest of a lessee on such a lease which might be recorded, and such as must have been, under the statute of frauds, in writing, it did not cover simple tenancies at will.<sup>2</sup>

§ 86. **Parties with Agreement for Lease.** — When a lessee is deemed, under a lien law, an "owner" to the extent of charging with the lien the interest vested in him, possession with an agreement for lease will be sufficient for that purpose unless some provision of the statute prohibits. Thus an agreement for a lease, executed in part, owned by the party contracting for the building, is sufficient to support the lien; and, if the lease be not executed until after the contract for the building is made, it will, when executed, relate to the time of the contract for the erection of the building.<sup>3</sup> But where the statute provided that "all persons furnishing materials . . . for premises held by written lease, shall have a lien," etc, and an occupier at the time of the furnishing of the materials had no written lease, but afterwards obtained one, no lien attached.<sup>4</sup>

§ 87. **Lessee has no Power to Build or repair at Expense of Lessor.** — The power of a tenant to create a lien on the property of his landlord for improvements and repairs has been generally denied. There is no lien on the fee for improvements made under contract with a lessee.<sup>5</sup> There is no principle of the common law, in the absence of agreement, which obligates the lessor of premises to make improvements, during the continuance of a lease, at the option of the lessee. This proposition has never been doubted. In regard to necessary repairs, while in the very earliest cases decided in the English courts it was supposed that an implied obligation rested on the owner to maintain the premises in a tenantable condition, because there existed the covenant of quiet and peaceable enjoyment between the lessor and lessee, yet it is now firmly settled in England, and in this country, where there is no statute or stipulation to the contrary, that the landlord is under no obligation to the

<sup>1</sup> *Gaule v. Bilyeau*, 25 Penn. St. 521.

<sup>2</sup> *Squires v. Fithian*, 27 Mo. 134.

<sup>3</sup> *Montandon v. Deas*, 14 Ala. N. S. 33; 298.]  
[*Rosenthal v. Md. Brick Co.*, 61 Md. 591.]

<sup>4</sup> *Dame's Appeal*, 62 Penn. St. 417.

<sup>5</sup> [*Vanderbilt v. Williams*, 40 Ill. App.

tenant, whether for life, for years, or at will, to keep the premises in repair, it being safest to allow the entire subject to be regulated exclusively by the agreement of the parties.<sup>1</sup> The common law has always thrown the burden of repairs, as much as possible, upon the tenant. Enjoying the benefits, he should bear the inconveniences; and it would be unjust that the expense of accumulated dilapidation should, at the end of the tenancy, fall upon the landlord, when a small outlay on the part of the tenant in the first instance would have prevented any such expense becoming necessary.<sup>2</sup> It is not therefore in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him so to do. The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent.<sup>3</sup> And if the premises have become uninhabitable by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him, either at law or in equity, to expend the money so recovered in rebuilding, unless he has expressly engaged to do so.<sup>4</sup> But when a landlord has expressly covenanted to repair, the obligation will be enforced; and, if he sue for rent, the tenant may recoup any damages he has sustained by the landlord's breach of the agreement.<sup>5</sup> No implied covenant, however, to rebuild, or repair damages on the part of the landlord, arises at common law, from the exception of casualties by fire and tempest in the lessee's covenant to repair.<sup>6</sup> A covenant by the lessor to repair runs with the land, and is therefore one of which an assignee of the term or an under-tenant may have the benefit, and is also obligatory upon a grantee of the reversion.<sup>7</sup>

§ 88. **Lessee cannot charge Estate of Lessor with Lien.** — In accordance with these general principles, where a tenant without the knowledge of the landlord erects a house, it gives no lien upon the title of the landlord. Although the latter may be made party defendant, no decree should be passed selling the fee. The interest of the tenant alone should be sold.<sup>8</sup> So, where a statute provides that "any person to whom a debt is due

<sup>1</sup> Hart v. Windsor, 12 M. & W. 68; id. 52.

<sup>2</sup> Taylor, Land. & Ten. § 327.

<sup>3</sup> Mumford v. Brown, 6 Cow. 475; Howard v. Doolittle, 3 Duer, 464; Sherwood v. Seaman, 2 Bosw. 127; Post v. Vetter, 2 E. D. Smith, 248; 13 Ind. 475.

<sup>4</sup> Pindar v. Rutter, 1 T. R. 312; Carter v. Rockett, 8 Paige, 437.

<sup>5</sup> Whitbeck v. Skinner, 7 Hill, 53; Nichols v. Dusenbury, 2 N. Y. 283. He may recoup only the amount the repairs would have cost, and not special damages. Dorwin v. Potter, 5 Den. 306.

<sup>6</sup> Weigal v. Waters, 6 T. R. 488.

<sup>7</sup> Demarest v. Willard, 8 Cow. (N. Y.) 206; Allen v. Culver, 3 Den. (N. Y.) 284.

<sup>8</sup> Judson v. Stephens, 75 Ill. 255.

for labor performed or furnished, or for materials furnished and actually used, in the erection, alteration, or repair of any building or structure upon real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him," the interest of a lessor is not subject to a mechanics' lien for work done in altering the demised building by order of an under-tenant of the lessee, although the lease contains a covenant by the lessee to make certain other alterations, and to keep the building in repair, and although the alterations made are apparent and the lessor lives in the immediate neighborhood. It would be a great stretch of construction to say that the lessor, whose demise really has the effect of an alienation so long as the term lasts, and who has parted with the control of the property during that time, agrees or consents, or authorizes any one to consent for him, to such a contract. It may well be supposed that the legislature assumed that a tenant for a short term would not be likely to make improvements for the benefit of the reversion at his own expense, and that there was no practical necessity for a statute provision to meet such a contingency, nor any hardship in leaving it to the carpenter or mason to inform himself as to the nature of the interest of the party in the estate upon which he furnishes labor and materials.<sup>1</sup> An agreement to make repairs and alterations, made with a lessee, who has covenanted in the lease to make all necessary repairs and improvements at his own expense, does not ordinarily subject the estate of the lessor to a lien.<sup>2</sup> To the same effect, if the law extend the lien to persons employed by "the owner, agent, or superintendent," a contract made by a lessee is not protected. It cannot be contended that these words include those who, *de facto*, control the property, irrespective of the ownership. If so, then a mere trespasser or disseisor, who wrongfully obtains the custody, might encumber the estate with the most ruinous burdens. Under such a statute, none but the rightful owner, his agent, or superintendent, can exercise this power. It would be intolerable to hold that a lessee could create liens upon the reversion, *ad libitum*, during his temporary occupancy.<sup>3</sup>

<sup>1</sup> Francis v. Sayles, 101 Mass. 435.

<sup>2</sup> Conant v. Brackett, 112 Mass. 18.

<sup>3</sup> Harman v. Allen, 11 Ga. 45.



§ 89. **No Authority implied from Relation of Lessor and Lessee.**<sup>1</sup>  
—An implied authority in the tenant from his relation to the estate has frequently been urged in support of the lien when improvements have been made by lessees, owing to the occasional apparent hardship upon mechanics, when, in consequence of not dealing with the owner, they have no sufficient remedy against the leasehold, and the reversion has been enhanced in value without adequate compensation from the lessor. To prevent injustice and define clearly the rights of the parties, statutes have been enacted either in terms limiting the lien to the ownership of the employer, or declaring the tenant should have no power to contract for his landlord, unless his consent be manifested in a particular manner. As where a statute provides that mechanics shall have liens on “the interest of their employers in the ground and the house,” the employment will not be considered to be at the instance of the owner, although he may have assented to the improvements when they are made by a lessee for his own immediate benefit, and though he may have paid the lessee a certain sum towards the completion of the work, if it were the understanding that the lessee was to do it on his own credit, and actually did so contract with the mechanics.<sup>2</sup> An agreement between lessor and lessee that the latter should be reimbursed for his improvements made on the demised premises does not constitute the lessee the agent of the lessor to contract for such improvements so as to render his reversionary estate liable to the lien.<sup>3</sup> Again, after a lessee’s term has expired, and the premises, including a completed house erected thereon by the lessee, have reverted to the lessor, a mechanics’ lien recorded against the house and lot as the property of the lessee will not be enforced, under a law which gives a lien “on any real estate of their employers,” by a sale of the brickwork and walls of the house, these being the parts of the house constructed by the holder of the lien, and the other parts having been constructed by other workmen.<sup>4</sup> So under a law that “any person who shall, as contractor, in pursuance of, or in conformity with, the terms of any contract with, or employment by, the owner, or by, or in accordance with, the directions of the owner or his agent, perform any labor . . . shall have a lien for the value of such labor . . . to the extent of the right, title, and interest

<sup>1</sup> [Approved in *Rothe v. Bellingrath*, 71 Ala. 55.]

<sup>2</sup> *Trustees Caldwell Institute v. Young*, 2 Duv. (Ky.) 582.

<sup>3</sup> [*Rothe v. Bellingrath*, 71 Ala. 55; Phillips § 89, cited with approval.]

<sup>4</sup> *Gaskill v. Davis*, 61 Ga. 644.

then existing of the owner of the premises," the interest of an owner, who leases lands and buildings with a covenant binding the lessee to make improvements, and leave them on the premises at the expiration of the term, is not bound by a lien filed for work and materials furnished to the lessee. To authorize the lien, there must be an employment by the person whose interest is to be bound, and such a lease does not constitute an employment to make the repairs covenanted for within the meaning of the statute.<sup>1</sup> Indeed, the legislature can confer no power on a tenant to encumber the freehold without the consent of the owner. Such an act would be unconstitutional if retrospective. The party making the contract for the improvement only binds his own interest in the land.<sup>2</sup> In like manner, if the lien "shall only extend to a contract entered into with the owner of any building for repairs, and not to any contract made with the tenant . . . and the building, with the interest of the employer in the land, shall be sold," the evident meaning is that the tenant of a building cannot subject it to a lien for repairs, but as to them the contract must be made with the owner.<sup>3</sup> A tenant for his own benefit agreed with his landlord, the owner of a house and lot, that if the lease was extended, and the owner would advance a certain sum, the tenant would make certain improvements, whereupon the tenant contracted with a builder for the improvement; there was no lien against the owner, but only against the tenant and his interest in the house, as the person who "caused" the work to be done, and the tenant and contractor were the only persons who "contracted" therefor.<sup>4</sup> So a lessor agreeing to make advances to a lessee to aid in the erection of certain houses to be built by the lessee, which advances are to be repaid by the lessee, does not subject the interest of the lessor to the lien under a law providing "that when a building shall be erected by a lessee or tenant for life or years of a lot of ground . . . the lien for work . . . shall apply only to the extent of the interest of the said lessee or tenant for life or years."<sup>5</sup> By the terms of a lease, buildings erected on premises were to be surrendered with the lot on termination of the lease; a mechanic had no claim by virtue of his lien against the interest of the reversioner.<sup>6</sup>

<sup>1</sup> Knapp v. Brown, 11 Abb. Pr. N. S. 118.

<sup>2</sup> Kirk v. Taliaferro, 16 Miss. 754.

<sup>3</sup> Lynam v. King, 9 Ind. 3.

<sup>4</sup> Johnson v. Dewey, 36 Cal. 623.

<sup>5</sup> Mills v. Matthews, 7 Md. 315.

<sup>6</sup> Dutro v. Wilson, 4 Ohio St. 101; McCarty v. Carter, 49 Ill. 53.

§ 90. **Building Contracts.**<sup>1</sup>—It may therefore be asserted, unless the law-making power expressly or by necessary implication enacts otherwise, that a lessee cannot without the consent of the lessor, bind the reversion to answer for the improvements or repairs which he may erect upon the premises. In Pennsylvania, however, the protection of the mechanic and material-man has been pushed to the last extremity. Its first act<sup>2</sup> provided that no building could be bound, except for the payment of a debt contracted by “the owner or owners thereof;” under which it was decided that where the owner made a contract with another to build his house, and that other engaged or employed mechanics or material-men, he did so upon his own credit, and not upon that of the building.<sup>3</sup> Subsequent statutes omitted these words, and made “every building subject to the payment of the debts contracted for any work,” etc. Decisions followed, declaring that the lien thus provided for arose from a credit given to the building, and not to the owners, and, as the remainder was benefited by the improvement, it was properly bound by the lien;<sup>4</sup> so if the owner of an equitable estate in possession employed the mechanics, the legal estate was bound.<sup>5</sup> In cases also where a tenant for years of a lot of ground procured permanent improvements to be made, it was held he thereby subjected the property to a lien in favor of the mechanic; and a proceeding thereupon to judgment, execution, and sale of the property divested the owner of the fee-simple of his estate, and vested the same in the purchaser from the sheriff.<sup>6</sup> This was felt to be a great hardship upon the owners of estates, and was modified by the passage of a law that the lien “shall not be construed to extend to any other or greater estate in the ground on which any building may be erected than that of the person in possession at the time of commencing the said building, and at whose instance the same is erected,” etc.<sup>7</sup> Notwithstanding this enactment, and because a builder who had contracted with the owner might pledge the building for the work and materials furnished, it was held that a contract whereby the owner of land leased the same for a period of years, and the lessee stipulated to erect thereon, during the first year of the term, a building, the lessor covenanting to pay to the lessee, when the building shall have been completed, one half of the cost of building,

<sup>1</sup> [Approved in *Rothe v. Bellingrath*, 71 Ala. 55.]

<sup>2</sup> Act of 1803.

<sup>3</sup> *Steinmetz v. Boudinot*, 3 Serg. & R. (Penn.), 541.

<sup>4</sup> *Savoy v. Jones*, 2 Rawle (Penn.), 350.

<sup>5</sup> *Bickel v. James*, 7 Watts (Penn.), 9.

<sup>6</sup> *Haworth v. Wallace*, 14 Penn. 118.

<sup>7</sup> *Holdship v. Abercrombie*, 9 Watts (Penn.), 52.

although in one aspect an improvement lease, is nevertheless, as to mechanics and material-men, a contract by the lessor for the erection of the building payable partly in money and partly out of the profits of the land. A complete view of the relation established is not obtained, it was said, without looking at it in both these aspects. It was decided that the latter aspect presents its predominant characteristics; as, on several contingencies, the lease was to terminate, and the parties were to settle as on a mere contract for building, charging rent up to the time of such termination; and in any event half the cost of building was to be paid in money. It was therefore regarded as a building contract, rather than as a lease, when seeking the secondary rights of the mechanics who did the work; and the estate of the lessor was bound by the mechanics' lien. In so doing, building contracts payable in rents are distinguished from improvement leases.<sup>1</sup> In a later case under the same provision of statute, that the lien "shall not be construed to extend to any other or greater estate in the ground on which any building may be erected, than that of the person in possession at the time of the commencement of the building, and at whose instance the same is erected," it was held the land of a lessor is bound for materials furnished at the instance of his lessee, if it appears that the latter holds under an improvement lease. It is not necessary that the lease should contain an express covenant to build, to make it an improvement lease. It is sufficient if such was the intention. But this may be rebutted by showing that the materials were not furnished on the credit of the land but solely upon the transfer of other securities.<sup>2</sup> Whether the insertion of a clause in a lease authorizing the making of alterations and improvements by the lessee constitutes such a written consent on the part of the lessor as to authorize the filing of a mechanics' lien against the premises for such alterations or improvements depends upon the question whether the cost of such alterations or improvements is to be borne by the lessor or the lessee. If by the former, the consent is sufficient to authorize the filing of such a lien. If by the latter, it is not.<sup>3</sup> Where a tenant contracts to make repairs and additions "during the first year in consideration of the low rent for that time," a building contract is created which subjects the premises to a mechanics' lien. That these repairs are required to be made at the cost of the tenant does not make any difference. Nor does

<sup>1</sup> *Woodward v. Leiby*, 36 Penn. 437.

<sup>2</sup> *Barclay v. Wainwright*, 86 Penn. 191.

<sup>3</sup> [*Boteler v. Espen*, 99 Pa. 313.]

a verbal notice by the landlord to the mechanics, that he would not pay for anything, make any difference.<sup>1</sup> Where a tenant contracts with his landlord to build or to repair buildings for compensation to be made by the landlord, either in money or the occupation and use of the premises, the tenant is the landlord's agent, building or repairing for him, at his ultimate cost, and the building is liable to lien as in all other cases of building or repairing by contract.<sup>2</sup> A., for a nominal rent, leased from B. an old furnace property with water-power thereon for a term of ten years, covenanting to repair, improve, and rebuild the furnace so that it should be fit for manufacturing iron. In no case was A. to remove his improvements, but if he elected to surrender the lease at the end of three years, he was to have an equal interest with the lessor in the improvements. Held, That the lease amounted to a building contract, and that the property was bound for all improvements made under the terms of that contract, if they came within the mechanics' lien laws. But the lessee substituted steam for water-power, and having for this purpose constructed a boiler-house and an engine-house, it was held that the contract did not authorize such erection so as to render the lessor's property subject to a mechanics' lien therefor.<sup>3</sup> Where a lease contains a covenant by the lessee to erect certain buildings, the lien of the builder is good against the lessor's estate.<sup>4</sup> A lease with a building covenant by the lessee and knowledge of the work by the owner amounts to "consent" of the owner to the building, and the lien attaches to his estate.<sup>5</sup> The contention that the lien must be limited to the sum the owner was to advance under his contract in the lease is untenable. The owner cannot enjoy accessions to his property made with his consent, without paying for them.<sup>6</sup> It is the same way with a contract to sell with covenant of the vendee to build, and mortgage to secure purchase-money. This amounts to "consent" of the vendor, and the lien attaches, even though there is a clause in the contract expressly stipulating that liens for labor and materials shall be subordinate to the vendor's claim, — lien rights arising under the statute cannot be discharged or prevented by a provision to which the lienor is not a party, and of which he had no notice at the time of his service.<sup>7</sup> It is sufficient to give the lien that the owner consented

<sup>1</sup> [Parker v. Hall, 14 Phil. 619.]

<sup>2</sup> [Hall v. Parker, 94 Pa. 109.]

<sup>3</sup> [Long v. McLanahan, 103 Pa. 537.]

<sup>4</sup> [Otis v. Dodd, 90 N. Y. 336.]

<sup>5</sup> [Schmalz v. Mead, 125 N. Y. 188.]

<sup>6</sup> Ibid.

<sup>7</sup> [Miller v. Mead, 127 N. Y. 544.]

to the erections and improvements.<sup>1</sup> The former cases cited in the last note were decided under a law which made consent of the owner a sufficient basis for the lien. But under statutes giving a lien for labor and materials furnished "at the instance" or "at the request" of the owner it was held that a building covenant by the lessee did not render the lessor's estate subject to the lien of mechanics and material-men.<sup>2</sup>

§ 91. **Improvement Leases — Building Contracts.** — These views were subsequently affirmed on the same contract; the court stating that although, as between the parties, it was an improvement lease, yet as to the mechanics and material-men it was a contract for the erection of the building, and the estate of the lessor was bound. True, the lien can affect only the estate "of the person in possession at the time of the commencement of the building, and at whose instance the same is erected;" but if this act were interpreted very strictly, it would soon have the whole lien law frustrated. A lease for three or six months to a builder, and possession under it, with a contract to build a house on the lot for the owner, would be exactly a case for no lien at all; for the builder would be in possession without the house being erected at his instance, and the owner would have had it erected without being in possession. The above clause does not apply to improvements by a lessor which are stipulated for by the lessee in the lease, like those mentioned in the preceding section;<sup>3</sup> it was framed to prevent the estates of remainder-men, lessors, vendors, and others in like position, from being swept away by liens filed for the erection of buildings under contracts in which they had no part.<sup>4</sup> So a contract whereby a building for a shingle machine was to be erected by a lessee and employee of a firm upon their land, they furnishing the lumber and water-power, and leasing the machine and fixtures, — both building and machine to be restored to them in good order when a specified number of shingles had been manufactured and paid for by him at a rate mentioned, — subjects the building to a mechanics' lien for work and labor done by the persons employed by the lessee to build it.<sup>5</sup> In improvement leases, where the use of the building partly pays for its erec-

<sup>1</sup> [Otis v. Dodd, 90 N. Y. 336, 339; Burkitt v. Harper, 79 N. Y. 273; Nellis v. Bellinger, 6 Hun, 560; Husted v. Mathes, 77 N. Y. 388; Cornell v. Barney, 26 Hun, 134.]

<sup>2</sup> [Cornell v. Barney, 94 N. Y. 394, 400.]

<sup>3</sup> Savoy v. Jones, 2 Rawle, 350; Bickel v. James, 7 Watts, 9; Holdship v. Abercrombie, 9 Watts, 52.

<sup>4</sup> Leiby v. Wilson, 40 Penn. 67.

<sup>5</sup> Hopper v. Childs, 43 Penn. 310.

tion, the lease is in point of fact a contract to erect the building, and the lessor "is the person in possession at the time of the commencement of the building, and at whose instance it was erected," and therefore the lien can be filed against the owner, although the contract was made with the lessee.<sup>1</sup> Under a law that the lien shall not "extend to any other or greater estate in the ground than that of the person in possession at the time of commencing said building, and at whose instance the same is erected," it was held that a life tenant who had leased the land for ten years for the lessee to erect a new building, was the party in possession at the commencement of the building, and at whose instance it was erected.<sup>2</sup>

§ 92. **Consent of Lessor not to be inferred against Agreement.**—In order to guard the owner against the ruinous effects liable to flow from such building leases, when confined to repairs, etc., it was found necessary in Pennsylvania to enact, in relation to certain counties of that State, "that nothing shall render property liable to liens for repairs, alterations, or additions, where the same has been altered by any lessee or tenant, without the written consent of the owner or reputed owner, or his or her duly authorized agent." Under this statute it has been decided, where a landlord in writing extended the lease of his tenants in consideration that they would make certain improvements "at their own cost," and improvements were made, and the material-man entered a lien for the work, that the premises were not liable to the lien. The consent to repair in the agreement was not absolute, but qualified and conditional. By its very terms it amounted to no more than a consent that the lessees might make the improvement at their own cost. Speaking through the covenant, the lessor said to the material-man, "I consent that the lessees may put a new front in the building demised to them, provided they do it at their own cost, but not otherwise." What right, then, had he to treat the consent as absolute, — to take the consent without the qualification annexed to it? The consent intended by the act is an absolute consent, — such as is consistent with the right to do the work on the credit of the building, though it may not expressly authorize it. It must not be clogged with any such condition or qualification as is inconsistent with the right to charge the building with the cost of the work, or which impliedly forbids it. In this there is no injustice to the mechanic. If he did the work without reference to

<sup>1</sup> Rush v. Perot, 12 Phila. 175; Wainwright v. Barclay, 12 Phila. 221.

<sup>2</sup> Fisher v. Rush, 71 Penn. 40.

the covenant, then he did it on the personal responsibility of the lessees, and is not entitled to charge the building for the price of the work and materials. If he looked at the covenant, he had notice that the work was to be done at the cost of the lessees, and that the lessor did not intend to incur any responsibility for it whatever. If he was not willing to do it on the terms assented to by the owner, he should have declined to do the job or exacted security for its payment. He had no right to do the work and charge the building.<sup>1</sup> Although under the same act that "nothing shall render property liable to liens for repairs, etc., where the same has been done by any lessee or tenant, without the written consent of the owner," etc., and a lease provided that the lessee should repair the premises at his own expense, and make alterations to fit it for a hotel, it was held that this was a sufficient written consent under the above act.<sup>2</sup>

§ 92 *a*. **When Owner is liable for permitting Lessee to build.** — Where a lien is given when a building is erected "by virtue of any contract with the owner, or his agent, or any person permitted by the owner of such lands to build," and in a lease it was agreed "that the improvements were to revert to the owner," and the owner had the privilege of terminating the lease and taking back the premises for \$5,000, the lessees erected buildings with knowledge of, and without objection of, the owner. It was held that the lessees were permitted by the owner to build thereon within the statute, and a lien could be enforced against the land to the extent of the owner's interest.<sup>3</sup> A lease and contract to convey is not the "consent" of the lessor required by the statute to subject his title to a lien for building, though the erection of buildings was contemplated by both parties being necessary to the utilization of the lease.<sup>4</sup> Again, where a lien is given "for labor done at the instance of the owner or his agent . . . unless the owner of the land upon which any improvement is constructed shall, within three days after he shall have obtained knowledge of the repair, give notice that he will not be responsible for the same, by posting in writing in some conspicuous place," etc., if a person enters into the possession of a house and lot with the consent of the owner, and makes repairs on the house by permission of the owner, under a parol

<sup>1</sup> *McClintock v. Criswell*, 67 Penn. 183;  
*Newell v. Haworth*, 66 Penn. 363.

<sup>2</sup> *Amos v. Clare*, 9 Phila. 35.

<sup>3</sup> *Burkitt v. Harper*, 27 N. Y. Sup. Ct. 581;  
*Otis v. Dodd*, 31 N. Y. Sup. Ct. 538.

<sup>4</sup> [*Currier v. Cummings*, 40 N. J. Eq. 145.]



agreement with the owner to pay for such repairs, and to purchase the property, the mechanics who do the work can enforce a lien on the premises for their labor, even if the person who makes the repairs does not effect a purchase. In such case the person who makes the repairs is the agent of the owner, and the owner's estate is bound by the lien.<sup>1</sup> So where a lessee was in possession, and made improvements, and the president of the corporation which was owner knew of the improvements, it was held that the owner was bound by the lien, in the absence of any notice being posted as required by the above statute.<sup>2</sup> If there is nothing in the lease to show that buildings erected by the tenant do not become the property of the landowner, and the latter allows work to be done on the buildings without giving notice that he will not be responsible, he is estopped to deny that the lien attaches to the land.<sup>3</sup> And a lien will exist against the owner of leased land for work on a building erected by the tenant, even though the building is removable at the end of the term, provided the lease says that no buildings shall be removed until all taxes, rents, and debts have been paid.<sup>4</sup> If the lease fails to express the intent of the parties that buildings erected by the tenant are not to become the property of the landlord, it may of course be reformed as between the parties, but not to the prejudice of the rights of lienholders acquired in good faith for value, and without notice of the mistake.<sup>5</sup>

§ 92 *b*. **When Consent of Owner must be in Writing.** — Similar to the Phelps decision quoted in the preceding section, where the law provided, "that if any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of the tenant shall be subject to the lien, unless such be erected by the consent of the owner of such lands, in writing," it was held that the consent contemplated is a consent to do the work, and not necessarily a consent, in terms or by implication, that the property shall be a pledge for the payment for such work. Nor will a clause in the consent that the work is to be done at the expense of the tenant or third party change the rule. So, the landlord will be responsible if there is a clause in the lease that the tenant shall do all repairs necessary to preserve the property.<sup>6</sup> The above decision was reversed on appeal, and it was decided that the written consent which will

<sup>1</sup> Moore v. Jackson, 49 Cal. 109.

<sup>2</sup> Phelps v. M. C. G. M. Co., Id. 86 Cal. 335, 338.]

<sup>3</sup> [West Coast Lumber Co. v. Apfield, 86 Cal. 335, 340.]

<sup>4</sup> [West Coast Lumber Co. v. Apfield, 86 Cal. 335, 340.]

<sup>5</sup> Gay v. Hervey, 41 N. J. L. 39.

bind the land of the owner for repairs contracted by the tenant must be absolute in its terms; and where the writing relied upon as the consent of the owner to the making of the repairs by another, contains a clause that the repairs shall not be at the expense of the owner, it is not a consent within the meaning of the above law.<sup>1</sup> So an assertion by the person holding the legal title to lands, made to parties about to erect buildings thereon under agreement with the person who has a contract of purchase therefor, that they would be perfectly safe in going on, is not a contract with them to put up the buildings, nor such a consent under the above statute as will bind the owner or the property; to have such effect it must be in writing.<sup>2</sup> Again, where no alterations were to be made, within certain specified exceptions, without the written consent of the lessors, no consent in writing being given, but the lessors notified the mechanic that the work must be done in accordance with their wishes, it was held that the directions given by the lessors did not make them parties to the contract in any sense, express or implied.<sup>3</sup>

§ 93. **Civil Law of Louisiana.** — By the civil code of Louisiana a lessor is bound to make, during the continuance of the lease, all the repairs to the premises demised which may become necessary, except such as, by the usage of places, it is the duty of the lessee to make, and those occasioned by breaking of the hearth, back of chimneys, plastering of the lower part of the interior walls, window glass accidentally broken, shutters, partitions, locks, and hinges; and, if the lessor refuse or neglect after demand, the lessee may himself cause them to be made, and deduct the price from the rent due.<sup>4</sup> And although architects, undertakers, bricklayers, and other workmen employed in constructing, rebuilding, or repairing houses, buildings, or making other works, on such houses, buildings, or works by them constructed, rebuilt, or repaired, have a lien or privilege for their payment,<sup>5</sup> it is held that there is no privity in law between the builder of improvements on contract with the lessee and the owner of premises; and builders who contract with tenants for alterations or repairs of the premises leased have no lien or privilege on the premises;<sup>6</sup> and the mere consent given in the lease to make alterations on the premises renders the lessor in no way liable to the builder. This privilege cannot be estab-

<sup>1</sup> *Hervey v. Gay*, 42 N. J. L. 168; *Macintosh v. Thurston*, 25 N. J. Eq. 242.

<sup>2</sup> *Strong v. Van Deursen*, 23 N. J. Eq. 369.

<sup>3</sup> *Muldoon v. Pitt*, 54 N. Y. 269.

<sup>4</sup> La. Civ. Code, § 2662.

<sup>5</sup> *Id.* § 3216.

<sup>6</sup> *Sewall v. Duplessis*, 2 Rob. (La.) 66.

lished or extended by analogy to similar cases where it is allowed. It is only given by express law.<sup>1</sup> So although another article of the code provides that a lessee may remove the improvements and additions he has made to the thing let, provided he leave it in the state in which he received it, it cannot be extended by implication to builders who contract with such lessees. Such contractors must be considered as having done the work on the personal credit of the lessee; and they have no right to remove the materials used in such repairs and improvements, on the ground that they have not been paid for.<sup>2</sup>

<sup>1</sup> *Hoffman v. Laurans*, 18 La. 70.

<sup>2</sup> *Sewall v. Duplessis*, 2 Rob. (La.) 66.

## CHAPTER X.

## MARRIED WOMEN.

§ 94. **General View of Rights of Married Women.**—The law respecting the rights and powers of married women over their property has never been in accord in the several States, and there must necessarily be some variance of decision as to the responsibility of their estates to the mechanics' lien. Much of this conflict in regard to the lien has arisen from the fact that some courts have assumed, as their premises, the stricter view of the common law that the legal existence of the *feme covert* is merged in that of the husband, with an entire incapacity to contract; while others have taken a broader and more equitable ground, that at least in equity as to her separate estate she is to be regarded as a *feme sole*. In those States which admit this power over the separate estate there is a further conflict. It is held by some that the power only extends to do such acts as are specially authorized by the conveyance creating the estate. The majority, however, following the English doctrine, maintain that her power over the estate is as ample as that of an unmarried woman, except so far as it is specially restrained by the instrument. The assumption of either of these fundamental propositions as the basis of reasoning has led to different results. Many States have also legislated upon this subject, and defined by express enactment the rule of law. But here again there has been no entire uniformity, although all the statutes have had for their object the security of property of married women to themselves, and more or less a correlative responsibility for their acts. The judiciary in each State are governed primarily in the enforcement of the lien against the estates of married women by expressed law, if such exist; and if not, by the analogies found in other jurisdictions which have adopted general principles similar to their own.

§ 95. **When Estate is vested in Married Woman as at Common Law.**—First as regards the right of lien in the absence of express enactment, when the legal estate is vested in the married woman. Under a statute which gave the lien only when the labor

and materials were furnished under "a contract or agreement," it was held that, as there could be no contract or agreement without the mutual assent of two or more persons competent to contract, — the competency of the parties being indispensable to its legal existence, — and as marriage suspends or merges the legal existence of the woman during coverture, and she must perform everything under the wing and protection of her husband, no lien could be enforced upon her property for the work and materials found; and this, though there were frequent protracted absences of the husband, and the wife was in the habit of transacting business as a *feme sole*.<sup>1</sup> To the same effect, under an early law, where a lien was given to artisans, etc., who furnished materials, "under contract with the proprietor thereof," the word "contract" was deemed to be used in its legal sense, to the existence of which there should be parties to it capable of being contracted with, and therefore coverture was a good plea in bar.<sup>2</sup> So, although a law provides that "every person who shall, by contract with the owner of any piece of land, furnish labor, shall have a lien upon it," etc.; and a contract is entered into between a wife, who is the owner, and her husband, and a contractor, for the erection of a building on the wife's land, as to which she had no separate estate, yet, unless allowed by statute, there is no lien against a married woman. It was said it is a well-established rule of law, that a married woman cannot bind herself by an executory contract; and as the lien is created by statute, as incident to the contract, when there is no valid contract, there is no lien. Were the married woman's interest in the estate bound by her contract, the whole estate might be sold to discharge a small lien, and a large surplus be converted into personal property and paid to the husband, and thus the estate of the wife would be defeated.<sup>3</sup> Again, an act gave a lien on behalf of mechanics, etc., "upon the interest of the employer;" it was held that before her interest in a lot could be brought under the lien, it must be shown that she was the employer of those who worked on the house or furnished the materials. But by the common law, she, being a *feme covert*, was incapable of contracting herself, and certainly could not bind her lands, except by special acts done in a particular manner. Could she then, in the legal sense, become the employer of others, to erect a building on her land or to furnish materials for it? She might unquestionably be the employer in

<sup>1</sup> Rogers v. Phillips, 8 Ark. 366.

<sup>2</sup> Sibley v. Casey, 6 Mo. 164.

<sup>3</sup> Kirby v. Tead, 13 Met. (Mass.) 149.

fact for such a purpose. But as it is equally certain that she could not by such a transaction render herself legally liable to pay the price, it was the opinion of the court that she could not be the employer in view of the statute, so as to subject her interest in the land, unless she had a separate estate in it with a power of charging it. Understanding this statute as making no change in the rights or powers of married women, it could not have intended to recognize or enforce any act of a wife which was wholly void by the pre-existing law; and as by that law she could not bind either herself or her land by anything short of a deed of the property, executed and authenticated, it follows that unless, in directing the supply of work and materials for the improvement of her land she acts as the agent of her husband or of others who might be liable on their personal contracts, there is no liability and no remedy for the price.<sup>1</sup> In another case it was held that a mechanics' lien so far resembled a mortgage that neither would affect the rights of the wife, unless she so co-operated with her husband as to bind her estate.<sup>2</sup> But where, during the building of a house for a *feme sole*, she married, and the work was afterwards completed, it was decided that a complaint to enforce the lien of the mechanic need not allege that the real estate was the separate property of the wife. The contract when made was a valid one, and the subsequent marriage could in no wise affect it.<sup>3</sup>

§ 96. **Separate Estate.**—As before intimated, there is a perplexing and irreconcilable conflict of judicial opinion as to the extent of the capacity of the wife, by her own individual act, to charge her separate estate. In England, and in New York, Connecticut, and other States, the preponderating current of judicial opinion is that the power of the wife in equity to charge her separate estate, whether real or personal, is limited only by the restrictive terms of the instrument of conveyance to or settlement upon her; while in South Carolina, Pennsylvania, and some other States of the Union, it is held that her power to charge her separate estate is, in general, only commensurate with the grant of power contained in the instrument through which she derives title. The fact that the legal title of the wife's estate is vested in trustees, for her use, does not, it seems, restrict her power over the estate, whatever it may be; nor would the consent of the trustees enlarge her power, unless it

<sup>1</sup> *Fetter v. Wilson*, 12 B. Mon. (Ky.) 91; *Robinson v. Huffman*, 15 B. Mon. (Ky.) 80.

<sup>2</sup> *Fitch v. Baker*, 23 Conn. 563.

<sup>3</sup> *Caldwell v. Asbury*, 29 Ind. 451.

were so provided in the instrument of settlement.<sup>1</sup> In the former, it has been decided under a mechanics' lien law, where married women were authorized "to hold their estates as if they were unmarried," if a general statute gives a lien against "all owners who shall become parties to certain contracts," that as a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, even before any statute as above allowing married women to hold their property as *femes sole*, they were liable, in respect to their separate property, on their contracts for the repairs and improvements, to the same extent as though they were not under the disability of coverture. The remedy of the other contracting party was at first confined to a court of chancery; but when the lien law was passed, as above, the remedy might be pursued in that court.<sup>2</sup> It has been held, however, that the separate estates upon which courts of equity engrafted their peculiar doctrines included necessarily only such rights and interests of the wife as would belong to the husband but for the limitation to her particular use. Such were personal estates, the rents and profits of lands during coverture, and the inchoate title which, by the birth of a child, the husband might acquire as tenant by the curtesy. The reversion in lands to the wife, when she owned them at the time of the marriage, was a legal estate, descendible to her heirs, to which courts of equity did not, and could not well, apply the doctrines which have been stated. In reference to such an estate she only had the disposing capacity which the common law or some enabling statute allowed to her. So, in regard to an estate in fee, conveyed directly to a woman after marriage, she could only dispose of the fee in the mode prescribed by law; that is, by fine and recovery, or such other solemnity as the law required for the disposition of estates in land by married women. Thus it appears that while courts of equity were disposed to give to married women the fullest power of disposition of their equitable estates, — when not limited by the instruments creating them, — they did not meddle or interfere with the disposition of their legal estates, but left those interests to be disposed of in such manner as the law had provided.<sup>3</sup> Notwithstanding the diversity of judicial opinion on the general question as to the power of married women over their separate estates, it has probably never been held that the wife may not charge at least

<sup>1</sup> Machir v. Burroughs, 14 Ohio St. 519. s. c. 4 Abb. Pr. 472; Colvin v. Currier, 22 Barb. 372; Yale v. Dederer, 18 N. Y. 265.

<sup>2</sup> Hauptman v. Catlin, 20 N. Y. 247; <sup>3</sup> Carpenter v. Leonard, 5 Minn. 155.

the rents, issues, and profits of her separate estate with the costs of repairs and improvements which are for the benefit of the estate, and tend to preserve it and make it available. This tends to effectuate the trust where the estate of the wife is a trust estate, and promotes the objects of the grant where the legal estate is granted directly to her. The purposes of the trust and the objects of the grant must be presumed to have been intended for the wife's benefit; and these purposes and objects might be and often would be entirely defeated, if she had no power to charge the rents and profits of the estate with the cost of repairs to prevent decay, or with the cost of improvements necessary to render property, otherwise unproductive, available for the production of income. In such cases it would be proper, on a proceeding to enforce a lien for repairs, that an execution should issue sequestering the rents of the property.<sup>1</sup> The rents and profits of a married woman's separate estate can be subjected to a lien by contract of herself or her agent, but her real estate not separate cannot be thus charged.<sup>2</sup>

§ 97. *Same.* — On the other hand, where it has been held that a married woman is, as to her separate estate, a *feme sole* only so far as she is constituted such by the instrument conferring the estate, and hence, in the disposition of such estate, is restricted to a particular mode or manner prescribed by the instrument under which she holds, the lien given by statute to a mechanic for work and labor done upon, or materials furnished for, any building, does not attach to the separate property of a wife, upon her contract, either separately or jointly with her husband; and her separate property cannot be made liable at law for such contract.<sup>3</sup> A married woman being thus incapable of binding herself or her separate property at law by her contracts, and her separate estate not being chargeable for work and labor, upon a proceeding to enforce a lien created by statute, this doctrine is held to apply, whether she holds the property to her separate use and in her own name under an enabling statute, or through the medium of a trustee, in whose name the legal title is, for her use.<sup>4</sup> In Tennessee, a married woman's building contract is void, and cannot give rise to a lien on her land.<sup>5</sup>

<sup>1</sup> *Machir v. Burroughs*, 14 Ohio St. 519.

<sup>2</sup> [*Charleston L. & M. Co. v. Brockmyer*, 18 W. Va. 586, 594.]

<sup>3</sup> *Selph v. Howland*, 23 Miss. 264.

<sup>4</sup> *Gray v. Pope*, 35 Miss. 116.

<sup>5</sup> [*Sexton v. Alberti*, 10 B. J. Lea, 452; *O'Malley v. Coughlin*, 3 Tenn. Ch. 431.]



§ 98. **When liable by Statute.**<sup>1</sup>—It is, however, clearly within the power of the legislature to subject the estates of married women to the lien of the mechanic. Statutes regulating marital rights and prescribing in what cases the wife's separate estate may be bound, will control the creation of the lien on her estate.<sup>2</sup> Thus, under a law which authorized a lien "on all contracts made with the owner of any tract of land," in a State where married women by statute "possessed the same in their own right," and where the husband and wife jointly contracted for the erection of a building on the land of the wife, a mechanics' lien was enforced against her property, though it was urged that the wife was not bound by any contract made during coverture, and that her title to the land could not be encumbered by a mechanics' lien under such contract. Upon a superficial view, it was remarked by the court, this position would appear plausible; for as a general rule, *femes covert* cannot make valid contracts, which courts of law would enforce against them. But to this rule there are exceptions even upon common-law principles, besides those which are interposed by statute. This action was commenced under a statute which authorized it on all contracts made between the owner of any tract of land and any person on the other part for furnishing labor. The contract was not only made with the married woman, but also with her husband; and the building was erected not only by the consent, but by the direct agency and procurement, of both, and for the special benefit of the wife's estate. All who were interested in the lot participated in the contract by which the value of the land was greatly enhanced at the expense of the mechanic. In all such cases this statute clearly provides a lien to the party furnishing the labor and materials, without any reference to the sex or condition of the party owning the land. And where by statute a husband and wife have the power to sell and encumber by mortgage the real estate by joint conveyance, it cannot be doubted that they would have power to make contracts by which the land would be held responsible for improvements made upon it. The right of a married woman to own and possess real estate as her own property is expressly acknowledged by this statute. Whether she acquire the title before or after coverture, "she shall," in the language of the law, "possess the same in her own right." While this statute does not materially enlarge the

<sup>1</sup> This section was cited with approbation in *Ex parte Schmidt*, 52 Ala. 256; *Warren v. Smith*, 44 Tex. 247.

<sup>2</sup> *Warren v. Smith*, Id. 247.

rights of married women in equity, it gives them the same powers and privileges at law over their estates which before could only be asserted in a court of equity. Law and equity act in concert, so far as general personal engagements of married women are concerned. As a necessary result of the principle that a married woman may take and enjoy property to her separate use, equity enables her to deal with it as a *feme sole*; and, when judgment is to be given according "to the justice and equity of the case," it would be rank injustice to suffer a *feme covert* to enter into such engagements, secure valuable improvements upon her real estate, and then exempt it from liability for those improvements. No decision from a court of justice should ever countenance such a system of fraud.<sup>1</sup> To the same effect, under a statute which did not enlarge the powers of married women, but secured their property to them, it was held that, under their privilege to enjoy the same, the right of making necessary improvements and repair arose by implication, and for which a lien would hold, but in such cases it must be alleged and shown that such work was necessary.<sup>2</sup> But where married women hold property as *femes sole*, and it is subjected to this lien, the surplus should not be ordered to be paid to the husband.<sup>3</sup> A married woman may charge her estate with a mechanics' lien by her sole act in orally ordering the work to be done.<sup>4</sup> A married woman's power to contract for improvements as well as repairs to her real estate is inseparably incident to her right to take and hold real estate for her own separate use. A mechanics' lien filed against a married woman's separate estate for work done and materials furnished in and about a dwelling erected for her is valid.<sup>5</sup> In Indiana a married woman may create a lien on her property like a *feme sole*.<sup>6</sup> When a husband leaves his wife, and is absent two years she may deal with her estate as a *feme sole*, and her agent contracting for repairs before divorce is granted creates a valid mechanics' lien on the property.<sup>7</sup> A mechanic making improvements in Kentucky will have no lien on a married woman's general estate unless he alleges and proves that the improvements

<sup>1</sup> Greenough v. Wiggington, 2 Greene (Iowa), 435.

<sup>2</sup> Kuhns v. Turney, 87 Penn. 497; Allen v. Graham, 12 Phila. 176.

<sup>3</sup> Woodburn v. Gifford, 66 Ill. 285.

<sup>4</sup> [Murphy v. Murphy, 15 Mo. App. 600; Carthage, etc. Co. v. Bauman, 44 Mo. App. 386.]

<sup>5</sup> [Appeal of the Germania Savings Bank, 95 Penn. 329.]

<sup>6</sup> [Stephenson v. Ballard, 82 Ind. 87, 88.]

<sup>7</sup> [Wright v. Blackwood, 57 Tex. 644.]

were necessary for the comfort of the wife and her family.<sup>1</sup> If a lien law provides for a personal judgment against the defendant, without specifically naming married women, it will not base a lien suit against a married woman, in a State where she has no power to bind herself personally. Equity may, however, charge the property.<sup>2</sup>

§ 99. **Other Instances.**<sup>3</sup>—To the same effect, where the law provided that the wife's property should continue to be hers "to the same extent as before marriage, . . . provided that nothing in this section contained shall be construed to authorize any married woman to give, grant, or sell any such real or personal property during coverture, without the consent of her husband," etc. The object of this statute was to relieve married women of the disabilities of coverture in regard to the use, enjoyment, improvement, and disposal of their property, whether the estate be legal or equitable, except the restriction mentioned in the proviso. As a *feme sole* may use and improve her property, so by this statute may the married woman; and if, as an incident of such use and improvement, the property itself becomes liable to pay her debts in the same manner as it would be liable if she were *sole*, it furnishes no reason for the construction that she is to be limited in the use and enjoyment in such manner that such liability shall not ensue. On the contrary, it may reasonably be inferred, from the terms of the statute itself, that it was the intent to make the property liable for her debts, since it expressly makes it so for all debts of the wife contracted before marriage. And courts of equity have always, or at least for a long period, held the separate estate of a *feme covert* liable for improvements thereon, made for the benefit of the estate. But it should in all cases be alleged and proved that the services were performed on the faith and credit of the wife's separate estate.<sup>4</sup> A similar decision was made under a law which declared that "the lien should be created by contract with, or at the request of, the owner," although the statute of conveyances required deeds to be executed with ordinary formalities of privy acknowledgments.<sup>5</sup> Again, where a statute provided "that no lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom shall be her separate property, as fully as if she was unmarried; provided

<sup>1</sup> [Roberts v. Riggs, 84 Ky. 251.]

<sup>2</sup> [O'Neil v. Percival, 20 Fla. 937.]

<sup>3</sup> This section was cited with approbation in Warren v. Smith, 44 Tex. 247; *Ex parte* Schmidt, 52 Ala. 256.

<sup>4</sup> Carpenter v. Leonard, 5 Minn. 165; affirmed in Tuttle v. Howe, 14 Minn. 145.

<sup>5</sup> Bliss v. Patten, 5 R. I. 380.

that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." This section has two inconsistent provisions; one, that such lands and the profits therefrom shall be the wife's separate property, as fully as if she was unmarried; and the other, that she shall have no power to encumber or convey except by deed, in which her husband shall join. To give full force to the latter provision, the wife could do nothing with her lands, except to occupy and cultivate them in person; she could make no lease; she could not contract to repair or improve them; and the first section would amount to little or nothing. It seems clear that the legislature intended to confer upon her the full power of enjoyment, with a restriction on her power to encumber or alienate. Whatever power, then, is incident to a complete holding would seem to be conferred upon her by a fair construction of the statute. If the improvement was necessary and proper for a full and complete enjoyment, then the wife could charge her separate property with the debts created in making it. But the complaint should aver this necessity. The question of the power of a married woman to make new improvements being a power liable to abuse, must be under the control of the court trying the case.<sup>1</sup> The latest decisions of Indiana state the law of that State to be that a married woman may make such contracts for the improvement of her real estate with a mechanic, as will authorize him to acquire a lien, without her intending to create a charge thereon, as the law creates the lien on her contract, express or implied. Nor is it necessary to allege that such improvements are necessary and proper for the full and complete enjoyment thereof. In such cases it may be assumed, until the contrary is shown by way of defence, that the contract was fair and conscionable and the improvements necessary and proper. Such contracts may be made by herself in person or by an agent appointed by her for that purpose. And the rules in cases of part-performance apply where she is concerned the same as if she were *feme sole*.<sup>2</sup> Again, it is said that where married women have the power to contract to charge their separate real estate, it is not necessary that they should have contracted with such view. It is the law and not the contract that gives the mechanic his lien. As married women are entitled to hold separate property, they must be permitted to improve, in order that they may enjoy it.<sup>3</sup>

<sup>1</sup> Lindley v. Cross, 31 Ind. 109.

<sup>2</sup> Vail v. Meyer, 71 Ind. 159.

<sup>3</sup> Shilling v. Templeton, 66 Ind. 587.

§ 100. **Other Instances.**<sup>1</sup> — So, where a statute gives the lien on “a contract entered into with the owner of any building,” and directs “the interest of the employer to be sold,” and a wife, with the assent of her husband, made a contract for the improvement of her separate property, the law ought to receive a liberal construction, and not such a one as would put it out of the power of a husband and wife to improve the property of the wife for their joint benefit. If the wife cannot contract for such a purpose, there is a stronger reason than in ordinary cases why the mechanic should retain a specific lien as a security for the labor bestowed. Disabilities are for the protection of parties incapable of contracting, and should not be converted into instruments of fraud or injustice.<sup>2</sup> Again, under a statute that gave “any person who shall perform labor for the erection of any house, by virtue of a contract with the owner,” a lien, it was held that a mechanics’ lien would attach against the separate estate of married women, notwithstanding their ordinary disability by reason of coverture.<sup>3</sup> Where, by a statute, “the owner of land consents to the erection of a building upon it, a lien is given to persons furnishing materials,” it applies where the owner is a married woman, and she is to be regarded as unmarried; and her consent may be implied from her knowledge, and the absence of any objection on her part.<sup>4</sup> Where a law declares that “every mechanic or other person who shall do or perform any work or labor upon, or furnish any material . . . for any building, . . . under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, . . . shall have a lien, . . . and every person, including all *cestuis que trust*, for whose immediate use, enjoyment, or benefit any building . . . shall be made, shall be included by the words owner, . . . not excepting married women as to their separate property,” a wife by her own contract may fasten a lien on her separate property, under the above statute, if the building be for her immediate use.<sup>5</sup> Under such a law an oral contract by the wife is all that is necessary. No concurrence of the husband is needful, nor is writing required, although the general statutes relating to separate estates of married women require writing for her contracts.<sup>6</sup> A claim against a wife for the improvement

<sup>1</sup> This section was cited with approbation in *Ex parte Schmidt*, 52 Ala. 256; *Warren v. Smith*, 44 Tex. 247.

<sup>2</sup> *Littlejohn v. Millirons*, 7 Ind. 125; *Johnson v. Tutewiler*, 35 Ind. 353.

<sup>3</sup> *Edwards v. Edwards*, 24 Ohio, 402.

<sup>4</sup> *Husted v. Mathes*, 77 N. Y. 388.

<sup>5</sup> *Ex parte Schmidt*, 52 Ala. 256; [*Wadsworth v. Hodge*, 88 Ala. 500, 503.]

<sup>6</sup> [*Wadsworth v. Hodge*, 88 Ala. 500, 503; *Cutcliff v. McAnally*, 88 Ala. 507; *Youngblood, &c. v. McAnally*, 88 Ala. 512.]

or repair of her separate estate is constructively within a proviso to a law which declares that "nothing therein shall be construed to protect the property of any married woman from liability for debts contracted in her name by any person authorized so to do."<sup>1</sup> But, where the laws of a State prohibit a married woman from charging her separate estate, except for "necessaries," the building of an addition to a dwelling-house is not *per se* necessary, and must be made so to appear by evidence.<sup>2</sup> Yet, where a statute enacted that a married woman "shall be liable on a note given for necessities," the repairs of a house in which she resides were held to be "necessaries;" and when a note is signed by a wife for them, although after the materials were furnished, the mechanic may enforce payment under the lien law.<sup>3</sup> So, again, if a married woman's act vest the legal title in the wife, mechanics have a lien on her land, if the contract was made with or recognized by her, and the improvements were necessary or convenient for the property.<sup>4</sup> Some States have expressly legislated on this subject with reference to the mechanics' lien, by enacting that "every person, including all *cestuis que trust*, for whose immediate use, enjoyment, and benefit any building . . . shall be made, shall be included by the words 'owner or proprietor,' not excepting such as may be minors, over the age of eighteen years, or married women." Such a law is confined to the wife's separate estate, unless expressly provided by the act itself; and, when it is not otherwise stated, it applies equally to her legal and equitable interests.<sup>5</sup> But in such cases no general judgment should be rendered against the wife. So far as she is concerned, the proceedings should be only against the property improved by the building.<sup>6</sup>

§ 101. **Husband no Right to create Lien.**<sup>7</sup> — There is no conflict of authority as to the proposition that, in order to charge the land of the wife, she must be either expressly or by implication the employer. No power resides in the husband, as husband, to bind the lands of his wife. Her estate cannot be made liable for improvements thereon not authorized by her.<sup>8</sup> To charge them with the lien by his act, he must have had authority from the wife for that purpose, or there must be shown such conduct on her part as fairly imports such authority. Thus it has been

<sup>1</sup> Finley's Appeal, 67 Penn. St. 453.

<sup>2</sup> Pell v. Cole, 2 Met. (Ky.) 252.

<sup>3</sup> Marsh v. Alford, 5 Bush (Ky.), 392.

<sup>4</sup> Barto's Appeal, 55 Penn. St. 386.

<sup>5</sup> Tucker v. Gest, 46 Mo. 339; Collins v. Megraw, 47 Mo. 495.

<sup>6</sup> Burgwald v. Weippert, 49 Mo. 60.

<sup>7</sup> This section was cited with approbation in Warren v. Smith, 44 Tex. 247.

<sup>8</sup> Warren v. Smith, Id. 247.

held that a husband cannot himself charge the real estate of his wife for money expended by him in making improvements thereon; neither can a mechanic who expends his money and labor on the wife's property at the instance of the husband alone. In such cases the mechanics' lien cannot be enforced.<sup>1</sup> Again, it is thus stated that a wife's property is not subject to a lien for work, in its improvement and repair, on a contract with the husband, unless done by her authority, and the claim should show this authority. A husband cannot encumber his wife's property without her consent, even for necessary repairs.<sup>2</sup> Where the lien is given for labor furnished on "contract with the owner of any land," etc., and a husband purchases materials which are used by him in repairing a house owned by his wife, and in so doing does not purchase for her, or profess to act in her behalf, but buys on his own account and solely on his own credit, giving his note for the price, no lien will be created upon the premises of the wife.<sup>3</sup> And this will be so, although the wife has knowledge of the work while in progress and says nothing, and occupies the dwelling after its completion.<sup>4</sup> So, where real estate is conveyed in fee to husband and wife, a mechanics' lien, on contract of husband, will not attach to the estate of the wife therein.<sup>5</sup> A mechanics' lien was filed against a husband as the owner for work and materials furnished to the land of the wife without her knowledge and consent; it was no lien on the wife's estate. But the husband cannot set up title of his wife in his own defence on a contract made by himself, nor she intervene to prevent the creditor from having his remedy against any estate of the husband.<sup>6</sup> So if materials be sold generally, without reference to the use to be made of them, the separate property of the purchaser's wife is not chargeable because they are placed upon it.<sup>7</sup> So, clearly, the husband has no right, legal or equitable, to claim compensation for services rendered in improving a wife's separate estate. If so, deeds and settlements for the separate use of the wife would be of little avail, and husbands would have the power to improve their wives out of their estates.<sup>8</sup> Nor can a wife's land be subjected to the payment of a claim of judgment creditors of her husband for improvements thereon made by him; and this though the wife had knowledge that the

<sup>1</sup> *Knott v. Carpenter*, 3 Head, 542; *Miller v. Hollingsworth*, 33 Iowa, 224.

<sup>2</sup> *Dearie v. Martin*, 78 Penn. 55.

<sup>3</sup> *Wendt v. Martin*, 89 Ill. 139.

<sup>4</sup> [*Wadsworth v. Hodge*, 88 Ala. 500, 506.]

<sup>5</sup> *Washburn v. Burns*, 34 N. J. L. 18.

<sup>6</sup> *Woodward v. Wilson*, 68 Penn. St. 208; *Schnell v. Clements*, 73 Ill. 613.

<sup>7</sup> *Esslinger v. Huebner*, 22 Wis. 632.

<sup>8</sup> *Webster v. Hildreth*, 33 Vt. 457.

improvements were being made, and the husband was expending his own means in making the same, if no fraudulent intent on his part is brought to her knowledge, or that she participated in any such purpose. In substance this case was: The wife owned the land; the husband was in debt; she expended some of her own means in improvement, he a much larger amount; she was guilty of no collusion, had no fraudulent purpose, but had knowledge of the improvements made by him, and made no objections to his thus expending his money. Under such circumstances, the creditors could not enforce a lien against the lands of the wife to the extent of the money thus invested by the husband. If the case stood as a voluntary gift or conveyance of property by the husband to the wife, without a consideration valuable in its nature, made for the purpose of defrauding his creditors, equity would follow such property into the hands of the donee or grantee, although the donee or grantee was in no way privy to the fraud. But this rule can have no application where the husband makes with his own means improvements on the lands of the wife, without any contract that he was to acquire an interest thereby in the realty, or that she was to be liable or accountable to him for the value thereof. The expenditure was voluntary, — not under any contract; and it would place at the disposal of an insolvent and spendthrift husband the entire real property of the wife, if his creditors could follow the means expended by him thus voluntarily thereon, and enforce their claims or liens to the extent of such expenditure. The wife cannot thus, without her consent, be made the trustee of the husband, holding her own lands in trust for the payment of liens in the creation of which she had no part. To recognize the existence of such a lien from the fact that he, while in debt, has added to the value of her lands by expending his means thereon would be most dangerous, in practice, and in violation of the rights of the wife, — rights which equity, because of her dependent relation, has ever made the peculiar object of its care.<sup>1</sup> In Indiana it is also held that a husband has no power to charge by his separate contract the real estate of his wife. And where work is done and materials furnished, at a husband's request, for buildings erected on the real estate of his wife, the latter is not liable, although she may have subsequently signed a promissory note for such work and materials.<sup>2</sup>

<sup>1</sup> *Corning v. Fowler*, 24 Iowa, 584;  
*Miller v. Hollingsworth*, 33 Iowa, 224.

<sup>2</sup> *Johnson v. Tutewiler*, 35 Ind. 353.



§ 102. **Recognition of Acts of Husband.**—On the other hand, care must be taken to guard against the frauds which may be perpetrated by permitting men to invest their money in improving the estates of their wives, which they themselves will afterwards enjoy, to the injury of their creditors; as well as against acts by which married women may be deprived of their homes by the improper intermeddling of their husbands in expending money on their property. Where a wife encouraged her insolvent husband to improve her property, by investing his means therein, to the injury of his creditors, it was held that the court, as a court of equity, might either decree a sale of the estate, and apportion the proceeds between the creditor of the husband seeking its aid, and the wife, according to their respective interests, or lease it out, and apportion the rent until the debt was paid. A married woman may, like a *feme sole* or even an infant, be guilty of collusion with her husband, to the injury of his creditors; in which case her rights of property will not be protected by a court of equity; but where nothing of the kind appears, and the evidence shows that the wife used every reasonable effort to prevent the improvements being made, remonstrated with her husband against it even in the presence of one of the workmen, and the work was done without her consent and against her will,—to permit her to be stripped of her home, and deprived of a shelter for herself and family under such circumstances, would be contrary to equity, and subversive of that protection intended to be thrown around her property. It would not be any less dangerous in its effects to encumber it with a judgment or mortgage.<sup>1</sup> “If the materials were furnished and used in the improvement of her property by her directions, or with her knowledge and assent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor, the law will give a lien for the value of the materials.”<sup>2</sup> That the wife examined the plans for the building; that the materials were furnished by the plaintiffs with her knowledge and consent; that they were reasonably necessary for, and were used in the improvements of her estate; and that during the progress of the work she was frequently present, directing as to the materials and as to the manner of construction, is evidence of a contract on her part.<sup>3</sup> The lien arises if the wife knows of and consents to the husband’s improvements of

<sup>1</sup> Barto’s Appeal, 55 Penn. St. 386.

*v.* Thackara, 143 Penn. 171; Bevan *v.*

<sup>2</sup> [Kelly *v.* McGehee, 137 Penn. 443, 447; Einstein *v.* Jamison, 95 Penn. 403; Bodey

Thackara, 143 Penn. 182.]

<sup>3</sup> [Bodey *v.* Thackara, 143 Penn. 171.]

her property.<sup>1</sup> "Where a husband constructs a house on the land of his wife, of which fact she has full knowledge, the agency of the husband will be presumed; in other words, the wife by her silence where she should speak in effect admits that the work is being done for her benefit."<sup>2</sup> It is error to exclude evidence that the wife saw and conversed with the plumber engaged by the husband to work on her house.<sup>3</sup> If one who is ignorant of the wife's interest contracts with the husband to build on the wife's land, and the wife knowing what is going on fails to disclose her interest or stop the work, she is estopped to set up her rights against the lien.<sup>4</sup>

§ 103. **When Husband acts as Agent.** — Wherever the married woman has been considered as having the power to charge her lands as a *feme sole*, this power has been held as a consequence to authorize the employment of her husband as her agent. Thus, it has been decided that a mechanic is entitled to a lien for work and labor performed on a house standing on the land of the wife, when such labor was performed under a contract with the husband as the agent of the wife, for her use and benefit, with her knowledge and consent, for which they promised to pay.<sup>5</sup> So, when a married woman authorizes her husband to act for her, and as her agent to contract for the building of a house upon her separate estate, the law gives the mechanic a lien thereon, though she may not have intended to charge the property therewith.<sup>6</sup> If the facts show that the husband acted as the wife's agent in employing a plasterer, etc., the lien attaches to the wife's property.<sup>7</sup> And in another case, where a petition for the enforcement of a mechanics' lien averred that plaintiff furnished the materials at the request of the husband as agent of the wife, in whom the title to the property was, and for her use and benefit, and with her knowledge and consent, for which they agreed to pay; it sufficiently appeared from these averments, on demurrer, that plaintiff furnished the materials upon a contract with the wife through her agent, and that the lien should be enforced as well against her as her husband.<sup>8</sup> To the same effect, under a statute which provided that the lien should "extend to the estate of the person in possession at the time of the

<sup>1</sup> [Frank v. Hollands, 81 Iowa, 165, 169.]

<sup>2</sup> [Bradford v. Peterson, 30 Neb. 96, 98; McCormick v. Lawton, 3 Neb. 449; Scales v. Paine, 13 Id. 521; Howell v. Hathaway, 28 Id. 807.]

<sup>3</sup> [M'Carthy v. Caldwell, 43 Minn. 442.]

<sup>4</sup> [Bruck v. Bowermaster, 36 Ill. App. 510; Paulsen v. Mauske, 126 Ill. 72.]

<sup>5</sup> Burdick v. Moon, 24 Iowa, 418.

<sup>6</sup> Jones v. Pothast, 72 Ind. 158; Dame v. Coffman, 58 Ind. 315, overruled.

<sup>7</sup> [Thompson v. Shepard, 85 Ind. 352, 356; Dalton v. Tindolph, 87 Ind. 490.]

<sup>8</sup> Kidd v. Wilson, 23 Iowa, 464.

commencement of the building, and at whose instance the same is erected," etc., where the wife was constructively in possession, and the building was put up by her husband with her knowledge and consent, it was, in law; constructed at her instance, and a lien filed against it was good. Unless married women have the power to incur debts for the repair or improvement of their separate estates, it is difficult to see how they can fully use and enjoy them. No mechanic would be safe in doing the most trifling repair, unless he were paid in advance; and it would be a serious inconvenience to them if all their dealings in regard to their property must be in cash. The argument is as strong for the improvement as the repair of the estate. Valuable property may remain a charge by the necessary payment of ground rent and taxes, if they could not procure credit to enable them to render it productive. If they can improve their estates, they may employ an agent for that purpose, and their husbands as well as a stranger.<sup>1</sup> In Washington, the husband has the management of "community" real property, and may create mechanics' liens on his wife's land.<sup>2</sup> The Kansas Code gives a lien to all furnishing labor or materials "under contract with the husband or wife of the owner," and the lien cannot be defeated by a contract between the husband and wife unknown to the mechanic.<sup>3</sup>

§ 104. **Agency, when implied.**—This agency may be implied from the conduct of the wife, unless otherwise provided by positive enactment. For while courts are uniformly solicitous to protect the rights of married women in respect to their separate property, they, like other persons, have duties to perform as well as rights to vindicate. It is as unbecoming in them as in other parties to take unfair advantages. If they look on approvingly and see their separate estates improved by the money and labor of the industrious, it would be a gross injustice to shield the property thus benefited from the usual and appropriate charges in such cases. So that a mechanics' lien for work done and materials furnished may be enforced against the separate estate of a married woman vested in a trustee, when such married woman has personal knowledge of such work, and to some extent gives personal directions respecting it, although her husband is the principal manager.<sup>4</sup> Where a wife assisted in giving instructions to workmen, it was held that the husband acted

<sup>1</sup> *Lex v. Holmes*, 4 Phila. 10.

<sup>2</sup> [*Littell, &c. Co. v. Miller*, 3 Wash. 230.]

481.]

<sup>3</sup> [*Bethell v. Lumber Co.*, 39 Kans.

<sup>4</sup> *Collins v. Megraw*, 47 Mo. 495.

as the agent of the wife in entering into the contract.<sup>1</sup> Again, where a building is erected on land belonging to a married woman in her separate right, upon a contract made by her husband, with her full knowledge and consent, and she does not disclose her interest, or take steps to prevent the erection, she will be estopped to set up her right in defence to an action to enforce a mechanics' lien for work done under the contract.<sup>2</sup> Married women, in having the powers of *femes sole* conferred upon them, with respect to their property, must assume the responsibilities and duties which necessarily follow, and if a married woman holds out to the world that her husband owns her property, as by neglecting to record her deed, or that he has power to bind her to others dealing with him, as where she is present at conversations relating to the contract, and makes no objection, she will be estopped from denying that her husband was acting as her agent.<sup>3</sup> Again, where a married woman has the legal right to bind herself, and a contract is made by the husband to erect a house on her land with her full knowledge, approbation, and consent, and she fails to disclose her interest, and, knowing what is being done, takes no steps to prevent it, she will be bound by estoppel from setting up her rights as a defence to a lien.<sup>4</sup> So if a husband, with the knowledge, concurrence, and approbation of his wife, contract in his own name for the erection of a dwelling on land belonging to his wife, the lot and building are liable on a mechanics' lien filed for work done; and therefore, in making the contract, the husband may be regarded in law as the agent of the wife, as much so as if he had avowedly acted by her express authority. Frequent visits by the wife to the building during the progress of the work, giving directions concerning the work, and selecting materials for the building, constitute sufficient evidence of her knowledge and approbation of the contract for building, and will estop her to deny that the contract was made by her husband as her agent.<sup>5</sup> Under the Wisconsin statute one who furnishes materials for a house which a husband is building on his wife's land with her knowledge and consent, may have a lien therefor upon such land, although it was understood that the husband should pay the entire cost of the house, and although the materials were purchased by the husband upon credit without the authority of

<sup>1</sup> McCormick v. Lawton, 3 Neb. 449.

<sup>2</sup> Schwartz v. Saunders, 46 Ill. 18.

<sup>3</sup> Anderson v. Armstead, 69 Ill. 453.

<sup>4</sup> Greenleaf v. Beebe, 80 Ill. 522;

Schwartz v. Saunders, 46 Ill. 18, approved.

<sup>5</sup> Forrester v. Preston, 2 Pittsb. 298.

his wife.<sup>1</sup> Evidence that the husband employing A. to work on the wife's land has the general management of the wife's estate, and that the wife knew A. was working there, and gave him some directions about the work, is sufficient to prove that the husband's act in employing A. was with the wife's authority.<sup>2</sup> But a petition which nowhere, either expressly or by any fair and just construction, alleges any contract or agreement was ever made with the wife, is defective, on general demurrer, although it may state facts which, if given in evidence under a proper state of pleading, would tend to prove a contract with a married woman by implication. As, for example, it would not be sufficient to allege that the materials were furnished for the benefit of the wife; as all or any property which may be furnished to a husband, or to a wife under a contract with the husband, in the enjoyment of which a wife may participate, is, in a sense, furnished for the benefit of the wife.<sup>3</sup> To charge the separate property of a married woman with a mechanics' lien for work and labor done or materials furnished, it must be alleged in the claim and proved on the trial that the work or materials were necessary for the reasonable improvement or repair of such separate estate, and substantially that they were so applied, and that the same was done and finished by her authority and consent. If the materials were furnished and used in the improvement of her property, and by her direction or with her knowledge or consent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor, the law will give a lien thereon for the value of the materials, her promise to pay being implied.<sup>4</sup> A mechanics' lien filed against the property of a married woman, but not averring the coverture, and that the labor was done and materials furnished upon her authority or with her consent, for the improvement of her separate estate, is fatally defective and void.<sup>5</sup> Her husband cannot bind her separate estate, even for necessary repairs, unless by her authority.<sup>6</sup> An answer that the improvements were made by her husband's order without her consent in writing is bad.<sup>7</sup> It is always a sufficient defence if the improvements were made against her consent.<sup>8</sup> In an action brought to

<sup>1</sup> [Heath v. Solles, 73 Wis. 217; North v. La Flesh, 73 Wis. 520.]

<sup>2</sup> [Wheaton v. Trimble, 145 Mass. 345.]

<sup>3</sup> Spinning v. Blackburns, 13 Ohio St. 131.

<sup>4</sup> [Einstein v. Jamison, 95 Penn. 403.]

<sup>5</sup> [Shryock v. Buckman, 121 Penn. 248;

Dearie v. Martin, 78 Penn. 55; Lloyd v. Hibbs, 81 Penn. 306; Schriffer v. Saum, 81 Penn. 386.]

<sup>6</sup> [Steinman & Co. v. Henderson and Wife, 94 Penn. 313.]

<sup>7</sup> [Neeley v. Searight, 113 Ind. 316, 320.]

<sup>8</sup> Barto's Appeal, 55 Penn. 386.

foreclose a mechanics' lien the defendant, the owner of the premises, testified that she entered into an oral contract with her husband, by which she was to pay him \$3,000 for constructing the house in question; that she paid him, prior to the filing of the notice of lien, the whole of such amount, except the sum of \$290, which she applied upon an indebtedness owing by him to her. She further testified that she had several lots and buildings, and that her husband had none; that she never had occasion to employ anybody, except her husband, to do any work on any of her buildings; that she left that to her husband to look after. Held, that under the circumstances of this case the court should have allowed the case to go to the jury upon the question whether the husband did not act as the agent of his wife.<sup>1</sup> Where a husband has work done on his wife's land, it should be carefully ascertained by those doing the work and furnishing the materials, whether the husband acts as agent for the wife or as principal contractor. In the latter case material-men will be sub-contractors, and must conform to the law provided for sub-contractors.<sup>2</sup> In Maryland, if the husband of his own motion has work done on the wife's estate she must be specially notified by the mechanic if he would claim a lien, but if the husband acts as the wife's agent no notice under § 10 of article 61 is required.<sup>3</sup>

§ 105. **Acts insufficient to raise Implication of Agency.** — There is, however, some diversity of opinion as to what acts on the part of a wife will imply an authority in her husband to make a contract, arising out of the general conflict before alluded to, namely, when the separate estate of a married woman is chargeable with the payment of debts. Thus it has been decided, following the cases which restrict her powers, that a contract for improvements cannot be implied from her acquiescence in permitting them to be put upon her land on a contract with her husband, and in giving directions how they should be executed. If, it is said, she could be connected with the contract in this way, the intention to charge her estate would still be wanting. Such acts on the part of the wife are but what she would ordinarily do, whether her separate estate were to be charged or not, and are too equivocal in their nature to admit any implication, one way or the other, even if any implied engagement could be allowed to have any effect in such a case. Neither can it make

<sup>1</sup> [Farmilo v. Stiles, 52 Hun, 450.]

<sup>2</sup> [Rand v. Parker, 73 Iowa, 396.]

<sup>3</sup> [Rimney v. Gettermann, 6 Md. 424,

431-432; Conway v. Crook, 66 Md. 290;

Jarden & Wife v. Pumphrey, 36 Md.

361.]

any difference that the husband was heard to say that his wife's money was to be used to pay for the improvements. This could not affect her estate. The mechanic should have taken care that he had such a contract as to be a charge upon the separate estate of the wife.<sup>1</sup> Where the lien arises by law out of a "contract with the owner," and a husband purchased lumber and erected a house upon land owned by his wife, who did not authorize the purchase of the lumber or know that it was bought on credit, but supposed it was paid for by her husband, it was held that the agency of the husband could not be inferred from the marital relation alone, and that the lien could not be enforced against the land.<sup>2</sup> So under a statute which gives a lien against the estate of the "employer," it cannot be extended to a case in which the husband is the actual employer, though with the knowledge and implied assent of the wife. To say that the wife may be regarded as the employer whenever it shall appear or may be inferred that although the work done or materials furnished for a building on her land may have been directed by the husband and done or furnished for him, the wife knew of, and assented to, or did not dissent from, his acts in the premises, would be in effect placing the interest of the wife under the control and mercy of the husband. This would be to extend the operation of the statute further than is authorized either by its terms or by its object and intent.<sup>3</sup> Where work is commenced under a contract with a husband, and without any concurrence on the part of the wife, and in its progress she comes apparently to convey to the mechanic a message from her husband, — expressing merely his desire as to the manner in which it should be done, and apparently as his agent, and giving no directions for herself, but stating that if it pleased her husband it would please herself, — this is not such conduct on the part of a wife, from which a jury could infer her contract or assent, that her interest in the estate should be subjected to a lien for the price of the work and materials originally furnished for the erection, upon the credit of her husband.<sup>4</sup> The fact that the materials were sold to the husband on running account and his note demanded in payment, is admissible evidence to exempt a married woman's estate from the lien.<sup>5</sup> A mechanics' lien is so purely statutory that its character, operation, and extent must be ascertained by

<sup>1</sup> *Hughes v. Peters*, 1 Coldw. (Tenn.) 69. <sup>2</sup> *Corning v. Fowler*, 24 Iowa, 584; *Barto's Appeal*, 55 Penn. St. 386.

<sup>3</sup> *Price v. Seydel*, 46 Iowa, 696; *Nelson v. Cover*, 47 Iowa, 250. <sup>4</sup> *Bliss v. Patten*, 4 R. I. 380.

<sup>5</sup> *Fetter v. Wilson*, 12 B. Mon. (Ky.) 13. <sup>6</sup> *Wright v. Hood*, 49 Wis. 235.

the terms of the statute creating and defining it, and the courts are powerless to take it up where the statute may leave it, and extend it to meet facts and circumstances which they may believe present a case of equal merit, or a necessity of the same kind, as the cases or necessities for which the statute provides. Accordingly where a law contemplated the lien should exist only where there was an express contract, and limited the lien to the title or estate of the party contracting, and a husband in his own name made a contract for the erection of buildings on his wife's separate property, it was held that no lien arose, and mere silence in reference to her title, or failure on her part to dissent from the contract of her husband, will not imply an intention on her part to bind her estate.<sup>1</sup> If a husband, against his wife's protest, buys lumber on his personal credit ostensibly for himself, and then puts it into a building on her land, there is no lien. If it had been bought in her name, and she knew it, she should have notified the plaintiff that she repudiated the assumed agency. But when bought in the husband's name no lien could attach except to his interest.<sup>2</sup> Under a statute making the wife's "knowledge and consent" to materials furnished, evidence of the husband's agency, it is not enough to show her knowledge.<sup>3</sup> Under a statute requiring a contract with the owner or agent, the knowledge and consent of the wife to the husband's contract for improvements on her land which he and not she promises to pay for and expects to pay for, is not sufficient to create a lien on her property.<sup>4</sup> A married woman's property cannot be subjected to a lien merely because she knew her husband was having work done on her property and made no objection.<sup>5</sup> A mechanics' lien cannot be enforced against the wife's property for materials furnished the husband and labor done by contract with him on his wife's property, she having nothing to do with the matter.<sup>6</sup> The mere knowledge of the wife, and her assent to the erection of improvements ordered by her husband and placed on her property, is not sufficient to charge her property with a mechanics' lien. The question as to whether a married woman ordered work to be done upon her property, is for the jury, in a mechanics' lien suit, to be determined from all the facts and circumstances of the case.<sup>7</sup> Where

<sup>1</sup> [Copeland v. Kehoe, 67 Ala. 594.]

<sup>2</sup> [Getty v. Tramel, 67 Iowa, 288.]

<sup>3</sup> [Smith v. Gill, 37 Minn. 455.]

<sup>4</sup> [Ziegler v. Galvin, 45 Hun, 44.]

<sup>5</sup> [Weir v. Page, 109 N. C. 220; Thompson v. Taylor, 110 N. C. 70.]

<sup>6</sup> [Meyer v. Broadwell, 83 Mo. 571.]

It does n't appear whether she knew of the work or not.]

<sup>7</sup> [Murphy v. Murphy, 15 Mo. App.

600.]



H. buys lumber and the wife knows it is being put into a house on her land she cannot escape the lien merely by showing her title to the land without showing whether she bought it with her own money or took it as a gift from H.<sup>1</sup> Where the wife did not authorize the husband's act, nor do anything to ratify it nor mislead sub-contractor, and there was an express written contract between the husband and contractor, the wife is not estopped to defeat the lien merely because she did not stop the work.<sup>2</sup> The Connecticut law gives a lien for materials furnished or services rendered "by virtue of agreement with or consent of the owner of the land on which the building is erected." Where A. owned a lot, and her husband H. contracted with B. to build a house on it, B. supposing that H. owned the land, and H. agreeing with A. to pay for the houses, it was held that A. had given no "consent" within the meaning of the law, and was not estopped by failing to give notice to the builder that the land was hers.<sup>3</sup>

§ 105 a. *Same.* — It has never been the policy of the law to subject the wife's real estate to the payment of the husband's debts, and the tendency of modern legislation is to extend rather than contract this immunity. It has been accordingly held that where a building is erected at the request of a husband on land of his wife, the builder's lien attaches only to the husband's life estate in the land; and the fact that the wife knew of the building being erected, and made no objection, is not enough of itself to make her interest in the land liable to the lien.<sup>4</sup> A husband, who was the owner of a life estate in the lands of his wife, contracted to erect temporary structures for breeding poultry. The wife had not authorized the contract, nor did the husband undertake to act for her, although she saw the improvements while they were being made. It was held under these circumstances that the estate of the husband was alone subject to the lien.<sup>5</sup> A contract made with the husband, for the erection of buildings upon land belonging to his wife, will not subject the land of the latter to a lien unless the husband was acting as the agent of his wife, or she has done some act by which she is estopped from asserting her rights. The mere fact that such a contract was made in the presence and hearing of the wife, and the improvements were made under daily inspection, will not make her

<sup>1</sup> [Howell v. Hathaway, 28 Neb. 807, 809.]

<sup>2</sup> [Barker v. Berry, 8 Mo. App. 446, 449.]

<sup>3</sup> [Huntley v. Holt, 58 Conn. 445.]

<sup>4</sup> Flannery v. Rohrmayer, 46 Conn.

<sup>5</sup> Gilman v. Disbrow, 45 Conn. 565.

liable upon a contract made with another who was not her agent.<sup>1</sup>

§ 105 b. **When Authority of Husband should appear on the Record.**—In deciding these cases where the interest of the wife was sought to be made responsible to the mechanics' lien, it has been held in Pennsylvania that the fact that the work was done at the wife's request should appear on the record, otherwise the lien is lost, irrespective of proof *aliunde*.<sup>2</sup> To charge the property of a married woman, the coverture should be set forth, and the case brought within the spirit of the law applicable to such cases.<sup>3</sup> Where it appears that the wife was the owner of the land, and had the evidence of her title on record, and the petition alleged a contract with the husband, that he was in possession and exercising acts of ownership over the land, and that the wife was personally cognizant of the work and labor bestowed, and the making of the improvements thereon, the facts stated in the petition are insufficient. If it was intended to bind the wife by way of estoppel, the facts to be relied upon should have been alleged, and if it was intended to bind her by the acts of her husband as her agent, such agency should have been alleged.<sup>4</sup> Evidence showing that, at the time the materials for which the lien is sought were furnished, the respondent was living with her husband in the building, for the repairing of which the materials were procured, and that the latter, without authority to bind his wife, purchased such materials in his own name and on his own credit, and was individually interested in having the repairs made, not only falls short of establishing any contract relation with the wife, but clearly excludes its existence.<sup>5</sup> One who erects a building on land of a married woman under a contract entered into by her husband in his own name, and not as her agent, has no personal claim against her, or lien on the property, unless she has done acts from which the law implies a promise to pay on her part. Mere averments that the building was erected "with the full knowledge, consent, and approbation" of the wife, and progressed "under her daily view and inspection," and that she is living with her husband in said building, claiming it as a homestead, show no liability on her part.<sup>6</sup> Again, certain acts and words of the wife, in respect to

<sup>1</sup> Geary v. Hennessy, 9 Bradw. (Ill.) 117.

<sup>2</sup> Lloyd v. Hibbs, 81 Penn. 306.

<sup>3</sup> Schriber v. Saum, Id. 385; Shannon v. Shultz, 87 Penn. 481; Loomis v. Fry, 91 Penn. 396.

<sup>4</sup> Wilson v. Schuck, 5 Bradw. (Ill.) 572.

<sup>5</sup> Willard v. Magoon, 30 Mich. 273.

<sup>6</sup> Lauer v. Bandow, 43 Wis. 556.

the admission of workmen into certain rooms of the house to make measurements for contemplated improvements, and in directing teamsters where to leave materials brought to the house, were held no evidence tending to show that the husband acted as her agent in procuring such materials.<sup>1</sup> If the complaint alleges that the materials were furnished and work done at her especial request, and the same were necessary to the full enjoyment of her property, it will be inferred, after verdict, that these facts were proved.<sup>2</sup>

§ 106. **When Consent to charge with Lien must be in Writing.**—Where a statute designates the particular mode in which the lien may be created, the direction defines and limits the rights of mechanics against the property of married women. As where the law requires “the consent of the owner for the erection of the building to be in writing,” the land of a married woman is not liable under a contract made with her husband, even if she, during the erection of a building thereon, acquiesce in its erection, and give directions in relation thereto.<sup>3</sup> So, if the law requires that the contract of a married woman must be in writing, the requirement will be enforced as regards the lien law.<sup>4</sup> Under a law which provided “that the lands of the wife shall be liable for all debts by her and her husband jointly contracted or created, in writing, for necessities furnished her or any member of her family,” it would be inconsistent with its manifest import to subject the land of a wife, upon a mere implied liability or even upon an express parol assumpsit, to pay for improvements on her land directed by the husband or even by herself.<sup>5</sup> In one case it was held that, although ordinarily no definite bargain was necessary to be consummated between the parties to secure the lien, yet to maintain the proceeding against the separate property of a married woman where they could only alienate their estates by deed, an express written contract, executed by both husband and wife, and acknowledged by the latter as a married woman, upon a private examination, was necessary.<sup>6</sup> On the other hand, it was decided where a married woman’s act prevented her real estate from being “encumbered except upon her written consent first had,” she may nevertheless, by parol, authorize the lien, because the lien does not arise from the act

<sup>1</sup> *Wright v. Hood*, 49 Wis. 235.

<sup>2</sup> *Sharpe v. Clifford*, 44 Ind. 346.

<sup>3</sup> *Johnson v. Parker*, 3 Dutch. (N. J.) 239; *Bliss v. Patten*, 5 R. I. 380.

<sup>4</sup> *Cameron v. McCullough*, 11 R. I. 173.

<sup>5</sup> *Fetter v. Wilson*, 12 B. Mon. (Ky.)

91.

<sup>6</sup> *Berry v. Weisse*, 2 E. D. Smith, 662, u.

of the husband, but by operation of law. It is not created by the husband's contract, but has its origin and root in the statute by which it is imposed.<sup>1</sup> But in the same State it has lately been decided, under the same statute, that she cannot by her oral consent authorize her husband to create a lien by confessing judgment.<sup>2</sup>

§ 107. **Purchaser from, entitled to Defence of Feme Covert.** — Although the privilege of a married woman to make the defence of coverture, like that of infancy, is personal, the rule does not apply to the case of purchasers from the husband and wife. They may avail themselves of it, although it was not set up by her as a defence, and judgment by default was given against her in a suit to subject the property in the hands of subsequent purchasers to a mechanics' lien created before the sale at her instance. It being a proceeding *in rem*, as purchasers they are entitled to the benefit of every defence which existed in favor of the vendor, showing that the lien attempted to be enforced was not valid in law. As purchasers of the property, they succeed to all the rights of the vendors, and are entitled to resist the enforcement of the lien upon any ground which would have been available to the married woman. The question upon which this suit depended was whether there was a valid lien upon the property; and if, for any reason, sufficient in law, the lien was not valid, it was competent for any subsequent purchaser to show that fact whenever the property in his hands was attempted to be subjected to the lien.<sup>3</sup>

<sup>1</sup> Forrester v. Preston, 2 Pittsb. 298.

<sup>3</sup> Gray v. Pope, 85 Miss. 116.

<sup>2</sup> Finley's Appeal, 67 Penn. 453.

## CHAPTER XI.

## MINORS AND OTHERS.

§ 108. **Minors.**—As the mechanics' lien arises from work done and materials furnished under an obligatory contract, if the contract be not binding, the lien necessarily fails. An infant is not bound by his contract except in certain cases, in which the erection of a building is not included. A conveyance or mortgage by him of his real estate would not be binding upon him; and legislatures are certainly not to be presumed to have intended to allow him to encumber his property, indirectly, by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. A minor who has nearly reached his majority may be as able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years; and neither in one case nor in the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age.<sup>1</sup> In another case it was held that, if a mechanic build a house on the land of a minor or a lunatic, no consent could be given; and, if he build without it he must find some other way of securing payment for his work and materials than by means of a mechanics' lien.<sup>2</sup> There can be no lien upon the land of a minor under the mechanics' lien law; for the lien given thereby is (except in the case of the land of married women, as to which there is an express provision for lien) inci-

<sup>1</sup> *McCarty v. Carter*, 49 Ill. 53.

<sup>2</sup> *Johnson v. Parker*, 3 Dutch. (N. J.) 242.

dent only to a legal liability to pay, which a minor is not competent to incur for building upon his land.<sup>1</sup> A lien cannot be acquired upon the property of an infant for work and labor supplied under contract *with the infant*.<sup>2</sup> And the guardian may maintain suit to quiet the title. The plea of infancy is good against a mechanics' lien, as the building of a house cannot be said to be necessities. The fact that the infant held himself out as of full age is immaterial.<sup>3</sup> But the fact that no lien exists under the mechanics' lien law is not conclusive that none may exist in equity, nor can an adverse decision thereunder prevent a party from availing himself of his privilege before that tribunal.<sup>4</sup> It is within the province of the legislature, however, to subject the property of minors to this lien, as where "owners" of property are defined to be "every person, including all *cestuis que trust*, etc., not except such as may be minors over the age of eighteen years, or married women."<sup>5</sup>

§ 109. **Ratification.** — The receipt of rents by a minor after he becomes of age is not such a ratification of the contract as would operate to create a lien against him. Ratification by an adult, of a contract made by him when a minor, is a question of intention. It can be inferred only from his free and voluntary acts or words. It would be unreasonable to compel a minor to choose between the utter abandonment of his property and the creation of a lien upon it under a contract made during his minority; and to say, if he retain the property, he ratifies the lien. If it were held that the mere receipt of rents amounted to a ratification, it would be taking from the minor the protection which the law designs to give him; for the builder might safely assume that the minor would continue in possession of his own property, and thus, by ratification, create a lien which the statute had not given when the contract was made. The builder might thus make what contract he could with the minor, under the assurance that though the contract was not binding, and the statute gave him no lien, one would nevertheless be worked out for him by a necessary ratification.<sup>6</sup>

§ 110. **Guardian.** — As a general rule, a guardian is not authorized to dispose of the property of his ward, except for his maintenance and education; nor this without the order of an appropriate court. Therefore, where a guardian advances money

<sup>1</sup> [Hall v. Acken, 47 N. J. L. 340, 341; citing Phil. §§ 108, 112.]

<sup>2</sup> [Alvey v. Reed, 115 Ind. 148, 149; citing Phil. § 108.]

<sup>3</sup> Price v. Jennings, 62 Ind. 111.

<sup>4</sup> Copley v. O'Neil, 57 Barb. (N. Y.) 299. So in the case of married women, Miller v. Hollingsworth, 33 Iowa, 224.

<sup>5</sup> Tucker v. Gest, 46 Mo. 339.

<sup>6</sup> McCarty v. Carter, 49 Ill. 53.

out of his own pocket for the erection of buildings upon the land of his ward, without the order of a court of equity, he cannot recover the amount from his ward.<sup>1</sup> So, where a merchant claimed to be entitled to a lien upon property for certain improvements placed upon it under a contract with a guardian, which he had no authority to make, there is no ground to support an equitable claim against the property. The person who made the improvements being fully informed of the title and condition of the property, his position is not analogous in any respect to that of a purchaser or *bona fide* possessor. He acted upon the faith of a contract which had no validity; and, however meritorious his claim may be in a moral point of view, it does not come within any principle upon which equity administrators relief in such cases.<sup>2</sup>

§ 111. **Mechanics' Lien on Contract with Guardian.** — No equitable lien exists either on behalf of the guardian or party who has contracted with him for the improvement of the ward's lands. Neither party has a right, under these circumstances, to the mechanics' lien, unless specially authorized by statute. As where a probate court had no power to authorize the erection of buildings upon the real estate of minors upon credit, nor did it undertake to exercise such power, and the guardian nevertheless erected a building for which there were not sufficient funds to pay, the mechanic has no lien on it; for, if a person deal with a party having by law but a limited authority, he can have no right beyond what the authority rightfully exercised would confer. So, if a probate court grant to a guardian permission "to erect, out of the funds of his wards, a building upon their lot, of such dimensions and quality as may suit their interest," the authority does not authorize the guardian to erect a building upon credit, and thereby destroy the interest of his wards.<sup>3</sup> Again, where a law gave "a lien against the owner to the extent of his interest, upon a house, and upon the land on which it stands, for labor done," etc., no lien could be acquired by the builder of a house upon a lot of land owned by the minor daughter of the defendant, although the defendant, in his contract for such building, claimed to own the lot; nor could he, as such guardian, without authority from a competent court, build a house upon the land of his ward, and charge the expense upon the ward, or create a lien upon the property for the labor and materials in favor of mechanics. The latter have

<sup>1</sup> Hassard v. Rowe, 11 Barb. (N. Y.) 22; 6 Paige, 390.

<sup>2</sup> Guy v. Du Uprey, 16 Cal. 196.

<sup>3</sup> Payne v. Stone, 15 Miss. 367.

no reason to complain, if, with knowledge, as constructive notice by a recorded deed, they do work and furnish materials upon a contract with one who is not the owner. Permission to erect on the ward's land a building, with the right of removal, could only in the above case be obtained from the guardian, which would be a contract by defendant with himself; so that the mechanic cannot claim even a license to erect and remove the building, that is binding on the ward. When the guardian erects a building, especially a dwelling, on the ward's land, it must be presumed to be a permanent annexation; and there is no ground, therefore, on which the guardian can be held to be the owner of the house, and, not being owner, there can be no lien. So although a statute authorizes a guardian "to keep up and sustain the houses, grounds, and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with any other moneys of the ward in his hands," this does not include building or rebuilding by the guardian, though a house may be destroyed by fire.<sup>1</sup>

<sup>1</sup> Copley v. O'Neil, 57 Barb. (N. Y.) 299; s. c. 39 How. Pr. 41.



## CHAPTER XII.

## CONTRACT.

§ 112. **Lien dependent on Contract but not created thereby.** — The creation of the lien, though arising by virtue of express legislative enactment, is essentially dependent upon the existence of contract, express or implied,<sup>1</sup> and the obligation of debt arising out of the performance of its stipulations by the mechanic.<sup>2</sup> There can be no lien unless the work is done under or by virtue of a contract with the owner or his agent.<sup>3</sup> Thus, where “every person who shall, by contract express or implied, with the owner,” etc., shall have a lien, the contract relation is a necessary prerequisite, and in proceedings to enforce a lien the existence and terms of the contract should be distinctly and affirmatively proved.<sup>4</sup> “Whoever performs labor . . . by virtue of a contract with the owner or agent thereof,” etc., shall have a lien, the affidavit to the account required to be filed must show that it was performed by virtue of a contract with the owner of the building or with his agent.<sup>5</sup> To allege that the work was done for one “who was building a school building for said defendant,” without alleging that he was doing so under any contract, is insufficient.<sup>6</sup> As the lien security is an incident that follows the legal liability to pay, whenever that obligation does not arise, or ceases, this security does not exist. Hence there is no lien on land in favor of a party who voluntarily performs work without express or implied promise of payment;<sup>7</sup> or when no privity of contract exists;<sup>8</sup> or when the debt is barred by the

<sup>1</sup> *McLaughlin v. Reinhart*, 54 Md. 76; *Mo. App.* 220, 225; *Cornell v. Barney*, 94 *Mochon v. Sullivan*, 1 *Montana*, 472; *N. Y.* 394.]  
*Dano v. M. O. & R. R. Co.*, 27 *Ark.* 566.

<sup>2</sup> *Choteau v. Thompson*, 2 *Ohio St.* 114; *Holmes v. Shands*, 26 *Miss.* 639; *Sodini v. Winter*, 32 *Md.* 130.

<sup>3</sup> [*Barker v. Berry*, 8 *Mo. App.* 446; *Hannon v. Gibson*, 14 *Mo. App.* 33; *Kansas City P. M. Co. v. Brundage*, 25 *Mo. App.* 268; *McAdow v. Sturtevant*, 41

<sup>4</sup> *Willard v. Magoon*, 30 *Mich.* 273; *Clark v. Raymond*, 27 *Mich.* 456; *Wagar v. Briscoe*, 38 *Mich.* 587.

<sup>5</sup> *Clark v. Schatz*, 24 *Minn.* 300.

<sup>6</sup> *O'Neil v. St. Olaf*, 26 *Minn.* 329.

<sup>7</sup> *Choteau v. Thompson*, 2 *Ohio St.* 114; *Holmes v. Shands*, 26 *Miss.* 639; *Sodini v. Winter*, 32 *Md.* 130.

<sup>8</sup> *Gross v. Eiden*, 53 *Wis.* 543; *Roberts v. Gates*, 64 *Ill.* 374.

statute of limitations;<sup>1</sup> or when the contract is void, being for the erection of an unlawful building; or when made by an agent who acted with the knowledge of the mechanic adversely to the rights of his principal;<sup>2</sup> or when it is within the statute of frauds.<sup>3</sup> The place where the contract is entered into is not material. The lien exists notwithstanding it may be made out of a State, and although statutes cannot operate extra-territorially. It is not the contract which creates the lien, but the furnishing and use of materials in pursuance of its provisions within the State.<sup>4</sup> But where the law does not make a contract necessary, it was held that it will not be required in regard to work done subsequent to the passage of the law; as where it is provided "that every person who shall do and perform labor upon any property of another," etc., shall have a lien.<sup>5</sup>

§ 113. **Nature of Contract.** — The contract must possess all the essential elements of contracts generally, as to parties capable of contracting, authority to contract as to the subject-matter, sufficient consideration to support its obligations, and performance. Statutes conferring the right of lien were not intended to exempt mechanics and others from the operation of established rules of law in respect thereto. It is no more hardship on them that they should regard these principles in making their contracts in relation to building houses than it is in reference to any other subject-matter. The term "contract," therefore, when used in these statutes, is to be understood in its legal sense, and to be interpreted by the ordinary rules of law.<sup>6</sup> An offer to furnish bricks, made by a commission merchant engaged in selling for plaintiff, and at least one other manufacturer, and accepted by the person buying the brick for which a lien is claimed, held not to be plaintiff's contract for furnishing them.<sup>7</sup> The contract must be with the owner or his agent, or a contractor or sub-contractor with such owner, for doing the work on behalf of such owner, and if a sailmaker furnishes sails to one in possession of a vessel who represents himself as owner, but is neither owner nor acting for the owner in getting the sails, the sailmaker has no lien.<sup>8</sup> It is indispensable that the person by or on behalf of whom the contract is made, should have some in-

<sup>1</sup> *Yates v. Weeden*, 6 Bush (Ky.), 438.

<sup>2</sup> *Allen v. Ogden*, 1 Wash. C. C. 174.

<sup>3</sup> *Loonie v. Hogan*, 5 Seld. (N. Y.) 435.

<sup>4</sup> *Gaty v. Casy*, 15 Ill. 189; [*Fagan & Osgood v. Boyle Ice Mach. Co.*, 65 Tex. 324, 332; citing *Gaty v. Casy*, 15 Ill. 189,

and disapproving *Birmingham I. F. v. Glen Cove Co.*, 78 N. Y. 30.]

<sup>5</sup> *Alvord v. Hendrie*, 2 Montana, 122.

<sup>6</sup> *Sibley v. Casey*, 6 Mo. 164.

<sup>7</sup> [*Wisconsin Brick Co. v. St. Peter St. Imp. Co.*, 46 Minn. 231.]

<sup>8</sup> [*Bates v. Emery*, 134 Mass. 186.]

terest in the premises on which the building is erected or the improvement made.<sup>1</sup> But it is sufficient if the defendant who made the contract was in possession of the premises claiming title.<sup>2</sup>

§ 113 *a*. **Claim must come within Terms of Contract.** — Where the lien is given in those cases in which “a special contract has been made with the owner or his agent,” and complainants sold lumber to a railroad company through the defendant, who was their agent, but failed within the statutory limitation to enforce their lien, and the agent used a part of the lumber thus sold in building houses on his own land, it was held that, the railroad company failing to pay for the lumber, the complainants had no mechanics’ lien on the agent’s land to secure the payment for the same.<sup>3</sup> An owner proposed to a material-man of a sub-contractor, that if the latter would furnish a specified quantity of lumber he would pay a specified sum. The proposition was accepted, and the owner paid the stipulated sum, which was less than the value of the lumber. Held, that the material-man was not entitled to a lien for the balance under a section of a law giving a lien for materials furnished by direction of the owner.<sup>4</sup>

§ 114. **Contracts need not be Express, unless required by Statute.** — The contract for building a house need not, at common law, have been either by express agreement or in writing, and it may be asserted that, unless some provisions appear in the statute requiring it, a verbal contract, either express or implied, will be sufficient.<sup>5</sup> An implied contract is enough,<sup>6</sup> whether for the original or the sub-contract.<sup>7</sup> It is sufficient if the facts are such that the law would raise a promise to pay on the part of the owner.<sup>8</sup> Thus a statute declared that “any person who shall hereafter, by virtue of any contract with the owner of any building,” etc., shall have a lien, the contract provided for might be either verbal or written, express or implied.<sup>9</sup> “Any person who shall perform labor or furnish materials . . . for erecting any

<sup>1</sup> [Paulsen v. Manske, 126 Ill. 72.]

<sup>2</sup> [Chisholm v. Williams, 128 Ill. 115, 123; Randolph v. Chisholm, 29 Ill. App. 172. See § 65 *et seq.*]

<sup>3</sup> Gillespie v. Stanton, 8 Baxt. (Tenn.) 284.

<sup>4</sup> Crane v. Genin, 60 N. Y. 127.

<sup>5</sup> Holmes v. Shands, 26 Miss. 639; Merch. & Mech. Savings Bk. v. Dashiell, 25 Gratt. (Va.) 616.

<sup>6</sup> [Portones v. Badenoch, 132 Ill. 377; Bruce v. Berg, 8 Mo. App. 204.]

<sup>7</sup> [Foeder v. Wesner, 56 Iowa, 157;

Neilson v. R. Co., 51 Iowa, 184.]

<sup>8</sup> [Williams v. Uncompahgre Co., 13 Colo. 470, 478; citing Phillips, §§ 65, 66, 75, 80.]

<sup>9</sup> Dalles L. & M. Co. v. Wasco Woollen M. Co., 3 Oreg. 527; Knapp v. Brown, 11 Abb. Pr. N. s. 118; Spencer v. Barnett, 35 N. Y. 94; Meehan v. Williams, 36 How. (N. Y.) 73.

house . . . by virtue of a contract or agreement with the owner," etc., shall have a lien; this contract need not be express, it may be implied from the acts of the parties. Where work is ordered for a building, and is done, the law raises a promise to pay for it, there being a complete contract between the parties.<sup>1</sup> Where sub-contractors had the right to notify owners of their claims, and "the owner of the building is hereby made liable for the amount, if indebted to the employer," etc., it was considered immaterial whether the liability of the owner to the contractor was upon a special or an implied contract to pay what the service was worth.<sup>2</sup> "In all cases where any contract shall be made between any proprietor or lessor of any tract of land or town lots on the one part, and any other person on the other part, for the erection," etc., a lien may exist thereunder, either by special or implied contract, against the party receiving the benefit. If, without any special contract, a party receive the labor or materials of another about his building, he is responsible to that person; and this statute gives the right of lien in such case in his favor.<sup>3</sup> Again, where the lien is given "under or by virtue of a contract with the owner," the contract need not be express or in writing, but may be oral or implied. And the fact that it was in writing would not exclude parol evidence to show the purpose for which the materials included in the contract were used.<sup>4</sup> So, an allegation that work was done with the knowledge, consent, and approbation of the owner is sufficient to support the lien, if the proper statutory steps have been taken.<sup>5</sup> In another case it was said, although the law contemplates a contract, it is not incumbent to establish the fact that there was an express antecedent contract made with respect to the exact quantity of work to be done. In the absence of evidence of such express contract, the character of the account, the time within which the work was done or the materials were furnished, and the object of the work or materials, may afford proper grounds for the presumption that the work was done, or the materials were furnished, with reference to an understanding from the commencement, that such work should be done or materials furnished if required by the builder.<sup>6</sup> A stronger case than any of the foregoing is where a lien was given upon condition that "a special contract with the owner of the lot" was made by the

<sup>1</sup> Hazard Pow. Co. v. Loomis, 2 Disney (Cin.), 544.

<sup>2</sup> Gilman v. Gard, 29 Ind. 291.

<sup>3</sup> Holmes v. Shands, 26 Miss. 639; 27 Miss. 40.

<sup>4</sup> Neilson v. R. Co., 51 Iowa, 184.

<sup>5</sup> Wheeler v. Hall, 41 Wis. 447.

<sup>6</sup> Barnes v. Thompson, 2 Swan (Tenn.), 515; Alley v. Lanier, 1 Coldw. (Tenn.) 540.

mechanic; and it was declared that nothing more was required than an employment and undertaking to do the work to fulfil this requirement; that the object of the legislature being to secure an industrious class of the community the benefit of their labor, the act should be so construed as to carry out this laudable purpose, and should not be defeated by a too rigid construction of the language employed.<sup>1</sup> So, where an owner gave notice to a contractor, as he might do under their contract, that he would finish the work in consequence of the latter's failure, he affirms instead of annulling the contract, and, whatever is due contractor after recoupment for damages, a lien against the owner will exist therefor in favor of sub-contractors.<sup>2</sup> In case some person other than the owner of the land employs a material-man or laborer to furnish material or to perform labor upon a building or erection upon such other's land, something more is necessary to reach the title of such owner than to insert his name as owner in the notice filed with the county clerk, or to say that he is such owner or reputed owner. It must be made to appear somewhere in the record, that such building or improvement was placed on his lands with his knowledge; and then the lien can only be defeated by such owner making it appear that within three days after he obtained knowledge of the construction, alteration, or repair of such building or other improvement, he posted notice in writing that he would not be responsible for the same, which notice must be posted in a conspicuous place upon said land, or upon the building or other improvement situated thereon.<sup>3</sup> An owner may avoid responsibility for materials furnished a contractor by posting a notice to that effect. But it must be posted in a conspicuous place or it will have no effect unless the plaintiff had actual notice of it.<sup>4</sup> The interest of the owner may be subjected to lien claims notwithstanding the labor and materials have not been performed and furnished at his instance, if knowing that alterations or repairs are being made, by lessee, he fails to give notice that he will not be responsible therefor. Evidence that the owner had an agent residing in the vicinity of the premises, who personally visited the reduction works, and knew that the work was being done and improvements being made, is *prima facie* sufficient to charge the owner with knowledge of that fact.<sup>5</sup> When a person is employed by

<sup>1</sup> Trustees Ger. Luth. Ch. v. Heise, 44 Md. 454.

<sup>2</sup> Murphy v. Buckman, 66 N. Y. 297.

<sup>3</sup> [Krossel v. Rowe, 19 Oreg. 188.]

<sup>4</sup> [Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 518.]

<sup>5</sup> [Gould v. Wise, 18 Nev. 253; Rosina v. Trowbridge, 20 Nev. 105, 110.]

the owner of a lot in an incorporated city or town, to grade, fill in, or otherwise improve the same, and he employs laborers to assist him in performing the work, the services of such laborers must be considered as having been rendered at the request of the owner.<sup>1</sup>

§ 114 *a*. **When Permission by Owner to build takes the Place of Contract.** — In consequence of occasional injustice done the mechanic by a lessee or vendee in possession under a contract of purchase, making improvements on the land and then subsequently forfeiting his interest therein by reason of non-compliance with his covenants, and the lessor or vendor, resuming possession of the land in an improved condition without being liable to pay for the buildings erected, it has been enacted by several of the States, that if an owner permits a party to build, he shall be responsible to the mechanics for their labor and materials.<sup>2</sup> Thus, under a statute which gives a lien "for labor and materials furnished for buildings, by virtue of any contract with the owner, or any person permitted by the owner of lands to build thereon," the owner contracted to sell certain premises to A., with the condition that the latter should erect buildings thereon, the owner loaning him the money for that purpose, and reserving the right to retain, from the advances agreed upon, the amount of any unsatisfied mechanics' lien. The mechanic filed a lien for work upon the buildings, done under a contract made with A. The owner foreclosed the contract, sold the property, and bid it in. In an action to foreclose the lien, it was held that, as the owner permitted the contract under which the work was done, he subjected his lien for the purchase-money to the mechanics' lien, and upon foreclosure took title subject to such lien.<sup>3</sup> Again, where a lien is given on land, when the building is erected with "permission of the owner," one who has performed labor for a contractor in the erection of a building will be presumed to have done so with the consent of the owner, in the absence of proof of any objection on his part.<sup>4</sup> The owners let premises, and, "as part of the consideration of the letting," the improvements were to revert to the lessors, and, in default of performance of covenants, the premises were to revert to lessors. Lessors saw the buildings being erected. Held, that the lessee was permitted by the owners to erect within the

<sup>1</sup> [Pilz v. Killingsworth, *et al.* 20 Oreg. 432, 434; Parker v. Bell, 7 Gray, 429; Sweet v. James, 2 R. I. 270; Weeks v. Walcott, 15 Gray, 54; Clark v. Kingsley, 8 Allen, 543.]

<sup>2</sup> See sections 90, 91.

<sup>3</sup> Hackett v. Badeau, 63 N. Y. 476.

<sup>4</sup> Wheeler v. Scofield, 67 N. Y. 311.

above law, and were responsible. The notice of lien need not allege the permission specifically; this is a fact to be alleged in the complaint.<sup>1</sup> But a mere verbal contract to sell land to another is not such a "permission" to the party purchasing as will make the owner's estate liable under a statute that renders his land liable to a lien when he has given permission to another to build.<sup>2</sup> A lien law declaring "that, for the purposes of the act, any person who may have sold or disposed of lands upon an executory contract of purchase, contingent upon the erection of the buildings thereon, shall be deemed the owner, and the vendee the contractor," does not change the actual relation between the vendor and vendee, or vary their legal rights as to each other, or to third persons, except for the purposes of the lien authorized by it.<sup>3</sup>

§ 115. **Contract need not be in Writing unless the Statute so provides.** — Illustrative of the other proposition contained in a preceding section, that the contract for building need not be in writing unless required by statute, we find that where the words of the law were "that in all cases when any contract shall be made between any proprietor or lessor on the one part, and any other person on the other part," it has been held that, as the statute does not in express terms require the contract to be written, there is no reason such a condition should be insisted upon by the court. Writing is rarely, if ever, necessary to the validity of a contract, unless by virtue of statutory provision.<sup>4</sup> The words of another statute were: any person who shall actually perform labor in erecting, etc., any building, etc., "by virtue of any agreement with or consent of the owner thereof," etc., shall have a lien; it is not essential that the agreement should have been in writing. The owner's consent to the application of labor in erecting the building is a necessary implication from an agreement to pay for that work, upon its completion, a stipulated compensation.<sup>5</sup> So it is not necessary the agreement should be in writing when it may be created "by reason of any contract, express or implied."<sup>6</sup> A lien law which clearly provides for the enforcement of liens where no written contract has been made will be enforced, although in another portion of the law claims on written contracts are expressly provided for.<sup>7</sup> Where a code provided that "every person who, by virtue of a

<sup>1</sup> *Burkitt v. Harper*, 79 N. Y. 273.

<sup>2</sup> *Conklin v. Bauer*, 62 N. Y. 620.

<sup>3</sup> *Schnyler v. Hayward*, 67 N. Y. 253.

<sup>4</sup> *Harrison v. Breedon*, 7 How. (Miss.) 139.  
670; [*Sontag v. Doerge*, 14 Mo. App. 577.]

<sup>5</sup> *Whitford v. Newell*, 2 Allen (Mass.), 424.

<sup>6</sup> *Busfield v. Wheeler*, 14 Allen (Mass.), 139.

<sup>7</sup> *Barber v. Reynolds*, 44 Cal. 532.

contract with the owner of a piece of land, performs work or furnishes materials, has a lien," the contract need not be in writing, or even proved by direct and positive testimony.<sup>1</sup> In cases where writing is not necessary, the value of the written contract is no otherwise material than as it furnishes proof of the request of the owner to have the work done, or as ascertaining its terms.<sup>2</sup> There may be cases, however, where no written contract is required between parties acting *sui juris*, and yet, by special enactment, persons under disability are to contract in writing or under other formalities. When such law exists, the right of the mechanic to a lien can only arise upon a compliance with these requirements; as where a wife can only deal with her property by written contract, and privy examination apart from her husband.<sup>3</sup> So, where a contract is required, at the time the cause of action accrues, to be in writing to fix a lien for labor, it cannot arise out of a verbal one.<sup>4</sup> In Arkansas the law does not create a statutory laborer's lien without writing.<sup>5</sup>

§ 116. **Special Contract with Third Persons.**—But where the materials or labor is bestowed by contract with a third person, and on his own account, such person being under contract with the owner of the property to do the work and furnish the materials, there is no liability on the part of the owner, except to the party with whom he contracted. His implied liability, that would arise generally from his receiving value from the party furnishing it, is taken away by the special contract he has made, and particularly by the express contract which that party has made with the person with whom the owner of the property has contracted to complete the work. If he contracted expressly with the owner of the property, there could be no question of the owner's responsibility. If he performed the labor or furnished the materials without knowledge of a contract between the owner and another who was engaged in it, and under no contract with that person, the owner, receiving the benefit of his labor and materials, would be liable to him for the value. But if, with a knowledge of the contract between the owner and the original employee, he does work or supplies materials, or if he does so under a separate contract with the employee and on his account, it is clear that he has no claim against the owner of the property. It was said that in the one case he must suffer by his

<sup>1</sup> Cotes v. Shorey, 8 Iowa, 416.

<sup>2</sup> Butler v. Rivers, 4 R. I. 38.

<sup>3</sup> Berry v. Weisse, 2 E. D. Smith 97.]  
(N. Y.), 662, n.

<sup>4</sup> Hair v. Blease, 8 Rich. (S. C.) 63.

<sup>5</sup> [Gates Bros. v. Burkett, 44 Ark. 90,



folly; in the other, he must abide by his contract. By the general law of contracts he would have no claim against the owner under such circumstances; and these statutes do not intend to give a lien except where there is a legal demand.<sup>1</sup> At one time in the history of this law in Pennsylvania, it was held, the lien was not secured to the builder if there was a special contract with the owner, under the supposition that the builder in such case should provide his own security.<sup>2</sup> These decisions were a surprise to the profession, acted almost as a nullification of the law, and were followed by an act of its legislature extending the lien to all cases of contract.<sup>3</sup>

§ 117. **Lien may be waived by Contract.**<sup>4</sup> — This right of lien, like others secured to parties for their own protection, may be surrendered by their agreements either expressed or necessarily implied. Where the rights and responsibilities are defined by a bargain, neither is at liberty to claim anything beyond the terms of it.<sup>5</sup> Thus, a statute creates no lien where the parties, by their contract, provide for a different security upon the same land for the same debt which the lien would otherwise secure. Thus, a mortgage is a species of security entirely inconsistent with the idea of a mechanics' lien upon the same land as a security for the same debt.<sup>6</sup> But this intention must plainly appear. Consequently, a lien may be enforced for labor performed in the erection of a house under the employment of one who has agreed with the owner of land to erect the house thereon, and to pay and discharge all claims for labor and materials furnished and used in the erection thereof, so that there shall be no liens upon the premises.<sup>7</sup> So where a contractor stipulated that no other person or sub-contractor should file a lien, it nevertheless did not prevent the contractor from filing a lien to secure himself.<sup>8</sup> Nor will the execution of notes for the payment of the work, upon a settlement of the account and extension of the time of payment, have the effect to avoid the lien, unless it further appear such was the intention of the parties.<sup>9</sup>

§ 118. **Contract need not stipulate for Lien.**<sup>10</sup> — Where the statute contains no other provision than, upon a contract for labor

<sup>1</sup> *Holmes v. Shands*, 26 Miss. 639; 27 Miss. 40.

<sup>2</sup> *Haley v. Prosser*, 8 Watts & S. (Penn.) 134; *Witman v. Walker*, 9 Watts & S. 183; *Hoatz v. Patterson*, 5 Watts & S. 537.

<sup>3</sup> *Lay v. Millette*, 1 Phila. 513; *Russell v. Bell*, 44 Penn. 47.

<sup>4</sup> This section was cited with approbation in *McMurray v. Brown*, 91 U. S. 266.

<sup>5</sup> *Haley v. Prosser*, 8 Watts & S. (Penn.) 133.

<sup>6</sup> *Barrows v. Baughman*, 9 Mich. 213.

<sup>7</sup> *Mulrey v. Barrow*, 11 Allen (Mass.), 152.

<sup>8</sup> *Young v. Lyman*, 9 Penn. 449.

<sup>9</sup> *Montandon v. Deas*, 14 Ala. n. s. 33.

<sup>10</sup> This section was cited with approbation in *McMurray v. Brown*, 91 U. S. 266.

being performed, the mechanic shall have a lien, it is evident that the lien is independent of the express terms of the contract, and follows as a right given by statute upon the performance of the labor as condition precedent. It is therefore not necessary that it should be expressly understood that the artisan is to have a lien for his work and materials. In fact, such a contract is seldom made, nor does the law contemplate it in order to make the lien effectual.<sup>1</sup> "It is well settled that there need be no stipulation for a lien, nor need the contract of supply be made with a view to charging the property. . . . If there is nothing negating the reservation of a lien the law raises the implication that the contract of furnishing was made on the security afforded by the property."<sup>2</sup> The builder, in the absence of express agreement to the contrary, is supposed to contract on the basis of the law which secures it.<sup>3</sup> In another case, it was held to the same effect to be no objection to the validity of a lien claim, that it does not appear that the materials were furnished upon the faith of any lien to be created thereby.<sup>4</sup> The lien does not arise out of a special contract by parties stipulating for it, but by performance of work where the statute secures it thereby.<sup>5</sup> It is the creature of statute. It exists on certain conditions independent of any special contract for the lien.<sup>6</sup> A sub-contractor has his lien, although he did not know of the right when he parted with the materials.<sup>7</sup> In still another case, where the law expressly provided that "such lien shall not attach unless the contract is made in writing and signed by the owner of the land and recorded in the registry of deeds," from this provision it is clear that the contract should be in writing; and if the owner be then capable of giving a lien on the fee or any less estate in the premises described in the contract, it will be so intended, although not so expressed in the terms of the agreement, because the statute gives such force and effect to the acts of the parties. When the owner of real estate, or of any right therein, makes a written contract for the erection or repair of houses thereon, it is presumed that he makes it with reference to existing laws, and with the intention to confer upon the person with whom he contracts all the rights which these laws create under his contract. Among these is the lien on real estate. This right, there-

<sup>1</sup> Jones v. Swan, 21 Iowa, 181.

<sup>2</sup> [Eufaula Water Co. v. Addyston Pipe & Steel Co., 89 Ala. 552, 555.]

<sup>3</sup> Haley v. Prosser, 8 Watts & S. (Penn.) 133.

<sup>4</sup> Morris Co. Bank v. Rockaway Man. Co., 1 McCart. Ch. (N. J.) 189.

<sup>5</sup> Davis v. Alvord, 94 U. S. 545.

<sup>6</sup> Ehlers v. Elder, 51 Miss. 495.

<sup>7</sup> [Mallory v. La Crosse Abattoir Co., 80 Wis. 170.]

fore, must be taken to have been in contemplation of both parties when the contract was made.<sup>1</sup> So, persons performing work or furnishing materials are *prima facie* entitled to the lien, unless it is shown that they looked to the personal responsibility of their employer alone; and parties resisting the lien of those *prima facie* entitled are bound to repel the presumption.<sup>2</sup> The contract being established and the performance of such work thereunder as is contemplated by the statute, the right to the lien becomes simply a question of law for the decision of the court.<sup>3</sup>

§ 119. **When Contract must be definite in its Terms.** — When it appears from the provisions of the law creating the lien that a contract more precise than that arising on an implied assumpsit is contemplated, it must be accordingly more definite in its terms. Thus, under a statute which provides that “any person to whom any money shall be due for labor and materials expended in the erection, etc., of any building, by virtue of any contract with the owner thereof, or other person having authority to contract for such labor, shall have a lien to secure the payment of such money, not exceeding the amount of said contract upon such building,” etc., a contract “to do, perform, and expend labor in the erection,” etc., of a house at a certain rate by the day is too indefinite and uncertain, both as to the period of its duration and the objects and purposes to be accomplished. There is no limitation in it of time within which the labor to be furnished is to be continued, or within which it may be terminated, and nothing precise and certain as to the objects upon which the labor may or shall be expended. It may be applied either to the erection of a new house or the repair of an old one which already exists, or to the erection or repair of one or many out-buildings on the land. In both of these respects the contract is vague and indeterminate. Such an agreement is a mere stipulation for the employment of a mechanic, and of such other workmen as he should have in his service, by the day, for an indefinite period, and until one or the other of the parties should choose to stop the further continuance of any work, or otherwise bring the contract to a close. This is not such a contract as will, although labor has been actually performed by the contractor, and has also been expended and supplied by him by the services of other persons in his employment and working on his account, create a lien upon real estate for the entire amount of

<sup>1</sup> Howard v. Veazie, 3 Gray (Mass.), 233; Atkins v. Little, 17 Minn. 353.

<sup>2</sup> Stephens v. Ward, 11 B. Mon. 339.

<sup>3</sup> Smith v. Coe, 29 N. Y. 666.

money which may have thus been earned. The statute provided, among other things, that any person to whom money shall be due for labor expended in the erection or repair of a building, shall have a lien upon the building, and the lot of land on which it stands, for his security, to an amount "not exceeding the amount of the contract." This plainly shows that the contract under which a lien may arise must be of such character, and upon such terms and stipulations between the parties, that the amount which may be earned under it may in some way be ascertained and determined with certainty. It must be so, because such a conclusion is indispensable to define and fix the rights of the parties. It is thus to be ascertained, on the one hand, to what amount the contractor for labor may insist upon establishing an encumbrance upon the land, and, on the other, within what limits the owner, or any subsequent party in interest, may insist upon its being restrained. The contract, then, which will enable the contractor to fix and maintain a lien upon real estate, must be in express terms and for the accomplishment of a definite purpose. It would undoubtedly be sufficient, if it provided for any designated object, such, for instance, as the erection of a dwelling-house, the repair of the whole or of any definite part of a building to be completed within a specified time and at a fixed and stipulated price, or for a sum to be ascertained by computation, allowing for the labor actually expended at an agreed rate of compensation for each day's labor. But in some way or other it must, under this statute, be made so definite and certain, that the amount which may be earned and become due upon a performance of its stipulations will not be wholly without limitation, both as to that which is to be done and the time during which the labor is to be continued. A contract for mere day's work is not of this character.<sup>1</sup> Under a similar law, "any person who shall actually perform labor in erecting . . . by virtue of any contract with the owner thereof . . . shall have a lien," a contract to build a house at a certain price by the day, employing such help as the contractor may deem necessary and at such prices as he may deem reasonable and proper, was held to be too indefinite to give a lien.<sup>2</sup> In a later case, however, in the same State, it was held that where the lien is given for labor performed in the erection of a building by virtue of "an agreement with, or by consent of, the owner of such building or structure, or of any person having authority from, or rightfully

<sup>1</sup> Wilder v. French, 9 Gray (Mass.), 393.

<sup>2</sup> Sanderson v. Taft, 6 Gray (Mass.), 533.

acting for such owner in procuring such labor," a general employment of a carpenter by a contractor, to work in getting out finish for a building at day's wages to be afterwards fixed is a sufficiently definite contract to secure a lien.<sup>1</sup> Where the law contemplated a contract between the owner and the mechanic, and the mechanic testified that he did not erect the mill by contract, but worked by the day, he is not entitled to a lien.<sup>2</sup> When a mechanics' lien could not be created on real estate unless there was a complete contract in writing, signed, acknowledged, and recorded, it cannot be enforced against lands of which there is no written identification in the agreement for the work.<sup>3</sup>

§ 120. **Express and Implied Contracts. — Case of Sub-contractors.** — There has been a stricter rule of interpretation adopted when a lien is claimed by a sub-contractor or persons employed by the contractor, than when the contract exists directly between the owner and his employee. Thus, a law was passed that "any person who shall actually perform labor . . . by virtue of any contract with the owner, or other person who has contracted with the owner, shall have a lien to secure the payment of the wages due," it was decided there must be an express contract entered into before the commencement of the work, and not a claim arising from an implied contract in order to give the workman a lien. In discussing the grounds of their decision, the court said: Such a lien is of a novel and extraordinary character, in rendering the owners of real estate liable to have their property sold, not only to enforce the performance of their own contracts, but also to secure the fulfilment of contracts to which they are neither party nor privy. Such statutes should be construed strictly, not only because they are in derogation of common law, but also in order to prevent the hardship and injustice which might result from too great latitude in their interpretation. Besides, it would lead to great uncertainty and confusion in titles to real estate, and to collusion and fraud in the settlement of accounts, if liens were allowed to accrue upon implied contracts which are necessarily unliquidated, and which in themselves contain no certain elements by which their amount can be ascertained and adjusted. But, by making an express contract the basis of a lien, the owner of real estate can always readily ascertain the extent of his own liability; and a contractor, in case of his own insolvency, would have no opportunity

<sup>1</sup> *Wilson v. Sleeper*, 131 Mass. 177.

<sup>2</sup> *Myers v. Buchanan*, 46 Miss. 420.

<sup>3</sup> *Hammond v. Wells*, 45 Mich. 11.

of increasing the claim for services by collusion with the laborer or mechanic, when it was to become a charge on the estate of his employer, beyond the amount he was to be personally liable for in case he had satisfied the claim. So where an act clearly implies that the contract is to be a distinct act, as by providing "that nothing therein shall be so construed as to affect any mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed," it must be an express contract, and not a claim arising under an implied contract, which from its nature cannot have the essential element of a fixed date or certain amount, but must accrue from time to time as the services are rendered. It would be an anomaly in legal language to speak of the date of an implied contract for services rendered.<sup>1</sup> Again where the law gives a lien to "any person who by virtue of any contract with the owner thereof, or his agent, or a person who in pursuance of an agreement with such contractor, shall, in conformity with the terms of said contract, furnish materials in building any house," it does not extend to persons furnishing lumber on an implied assumpsit, but only when the materials have been delivered in pursuance of a previously existing express contract. In defence of the propriety of this law the court expressed itself, that there is, in fact, no necessity that the lien should be extended beyond this; for where the materials are furnished either to the owner or building contractor without any existing contract, he may require payment as he furnishes them. He is under no obligation to furnish any, only as he receives his pay as he goes along. Where the evidence shows that the owner was building a house, and the material-man delivered to him a certain quantity of lumber which was used by him in the erection of his building, the only liability of the owner is one of implied assumpsit. It will not do to imply a previously existing contract from the fact that the materials are furnished. It is true the law will raise an implied assumpsit to pay; but it will not go so far as to raise the presumption that they were furnished in pursuance of a previously existing contract to furnish them.<sup>2</sup> Under the civil code of Louisiana, which requires the agreement to be reduced to writing and registered when the claim is over a certain sum, these requirements are essential.<sup>3</sup>

§ 121. **When Contract must be recorded.** — So if a statute require, by words or necessary implication, either an express con-

<sup>1</sup> Parker v. Anthony, 4 Gray (Mass.), 289.

<sup>2</sup> Hatch v. Coleman, 29 Barb. (N. Y.) 201.

<sup>3</sup> McRae v. Creditors, 16 La. An. 305.

tract or that it shall be reduced to writing and recorded, they are essential to the creation of the lien.<sup>1</sup> Where "no lien shall attach unless the contract is in writing and recorded," the record, which is thus made an indispensable condition of its existence and validity, by a necessary implication limits and determines its effect and consequences, and makes the contract which sustains it unalterable by the parties. When it is thus legally established, it secures the laborer for whatever he earns in the faithful performance of the obligations he has assumed. But there must be a strict adherence to the contract. The lien cannot be maintained, if the service, instead of being rendered in accordance with the terms as it is written and recorded, is only in conformity to its stipulations as they have been varied, modified, and changed by a subsequent parol agreement. If the parties desire to make alterations and changes in those stipulations, and still to continue an encumbrance upon the land, they must effect their purpose by a new contract, which will of itself amount to a new lien; and they can do it in no other way.<sup>2</sup> So where a written contract for the erection of a building was entered into between a mechanic and another person, and was duly recorded to preserve the mechanics' lien, under a law that "master-builders and mechanics of every denomination, contracting in writing to put up and erect buildings, etc., shall have a lien in the nature of a mortgage," etc., and "that every contract made and entered into as aforesaid shall be recorded," etc., and in the erection of the building a larger amount became due to the mechanic than was stipulated in the contract, there was no lien in favor of the mechanic for the excess over the amount provided for in the written contract. But where, in the written contract, it was stipulated that the mechanic should have and retain the possession of the premises, until he should be paid for the work specified in the contract; and subsequently the owner executes a deed of trust upon the property, securing the mechanic in the payment of a sum larger than, but inclusive of, the amount due him under the written contract; and soon afterwards the owner went into possession of the premises as a tenant of the mechanic, and occupied the premises thenceforth as his homestead, — notwithstanding the property had so become the homestead of the owner, it was liable to sale for the payment of the whole sum secured by the deed of trust.<sup>3</sup> A more liberal rule was adopted in the following case, where the court say: Although

<sup>1</sup> *Huck v. Gaylord*, 50 Tex. 578.

<sup>3</sup> *Potshuisky v. Krempan*, 26 Tex.

<sup>2</sup> *McClallan v. Smith*, 11 Cush. (Mass.) 307.  
238.

it be necessary that the contract should be in writing, when the statute gives the lien, if the house be "erected under a contract in writing between the owner and builder," and the work for which the owner is sought to be charged must be done in pursuance of such contract, still it is not necessary to the enforcement of the remedy given by the statute that the work should be in literal compliance with the contract, nor will a departure from the prescribed mode in which it was done deprive the mechanic or laborer of his remedy, so long as the work is done upon the house mentioned in the contract; as where the contract was to build a two-story house, and the house in fact built was a three-story house, notwithstanding this variance the mechanic or laborer who bestowed work upon the building was entitled to the remedy given by the statute. The statute, it was said, was intended to secure to the laboring man the reward of his labor; all that he is concerned to know is that the house is erected under a contract in writing between the owner and builder. Is every man who draws a cart-load of materials or carries a hod of mortar, to look into the contract and examine its details, to see whether the house is being built in all particulars according to the contract? The remedy, it is true, is an extraordinary one, but does not require such particularity.<sup>1</sup>

§ 121 *a*. **The California Law** provides that building contracts for more than \$1,000 will be wholly void unless recorded, and requires that twenty-five per cent of the price shall not be payable until thirty-five days after completion of the work. It does not, however, make the contract void for failure to comply with this last requirement. And the contract is good, although the price is payable thirty days after completion instead of thirty-five. Nor is this deviation such a substantial non-conformity with the statute as to make the owner liable to sub-contractors without reference to the amount still due the contractor. The provision reads, "In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished, by all persons except the contractor, shall be deemed to have been done at the personal instance of the person who contracted with the contractor, and they shall have a lien for the value thereof."<sup>2</sup> The law only applies to contracts in which the agreed price exceeds \$1,000.<sup>3</sup> The memorandum of contract may be filed for record

<sup>1</sup> Haswell *v.* Goodchild, 12 Wend. (N. Y.) 373.

<sup>2</sup> [San Diego L. Co. *v.* Wooldredge, 90 Cal. 574, 578.]

<sup>3</sup> [Giant Powder Co. *v.* Flume Co., 78 Cal. 193; Sidlinger *v.* Kerkow, 82 Cal. 42; Kerckhoff-Cuzner Co. *v.* Cummings, 86 Cal. 22.]



if it contains all the matters required by statute, or the final contract itself may be filed. When the contract is filed the whole of it must go to the recorder.<sup>1</sup> In general the contract is not void because plans and specifications were not filed in the recorder's office.<sup>2</sup> But specifications must be filed when they are made a part of the contract by its terms. As where the contract provides that the work is to be done in accordance with certain plans and specifications "hereto annexed," the contract is incomplete without the said plans, and if they are not filed for record the contract is invalid.<sup>3</sup> A contract is not good which stipulates that seventy-five per cent of the cost of materials and labor completed at the time of payment shall be paid on the first and third Saturday of each month, remainder payable thirty-five days after completion, with no provision for "retaining twenty-five per cent of the entire *contract price* for thirty-five days after completion of the work," as required by law. Seventy-five per cent of the *cost* might exhaust the contract price, and leave nothing for the protection of sub-contractors.<sup>4</sup> The statute is substantially fulfilled by a provision in the contract that twenty-five per cent shall be withheld for thirty-five days unless the contractor shows receipts for all work and materials, and gives bonds that all bills will be paid, and that no liens exist, in which case the balance may be paid by the owner at once if he so chooses.<sup>5</sup> If the owner does not retain twenty-five per cent of the contract price for thirty-five days after completion of the work, he will be responsible to the sub-contractors.<sup>6</sup> A record that does not show the *material* of which the building is to be constructed, fails to state "the general character of the work," as required by law.<sup>7</sup> When the contract is not recorded it is wholly void, and the amounts due material-men are to be determined entirely irrespective of its provisions.<sup>8</sup> Where work of a merely trivial character appeared to have been done at eight o'clock in the morning, and the contract was filed for record at half past ten o'clock the same day, it was held on appeal that the court should have found that the filing occurred before work had commenced.<sup>9</sup> A bond of indemnity against liens given to the owner by the contractors after the

<sup>1</sup> [Willamette, &c. Co. v. College Co., 94 Cal. 229.]

<sup>2</sup> [Reed v. Norton, 90 Cal. 592.]

<sup>3</sup> [Willamette, &c. Co. v. College Co., 94 Cal. 229, 234; Yancy v. Morton, 94 Cal. 558.]

<sup>4</sup> [Willamette, &c. Co. v. College Co., 94 Cal. 230, 235.]

<sup>5</sup> [Yancy v. Morton, 94 Cal. 558.]

<sup>6</sup> [Reed v. Norton, 90 Cal. 590.]

<sup>7</sup> [Willamette, &c. Co. v. College Co., 94 Cal. 230, 236.]

<sup>8</sup> [Id.]

<sup>9</sup> [Reed v. Norton, 90 Cal. 590, 600.]

execution of an unrecorded contract for more than \$1,000, is not void for want of record. It is not within the letter or reason of the recording statute. The building contract was void, but may nevertheless be lawfully performed. And the contractor inducing payment in full by means of his bond is estopped to deny his liability for the liens which he failed to discharge.<sup>1</sup> The law requiring writing and record of building contracts does not apply to a sub-contract, although for more than \$1,000.<sup>2</sup> The contract of a material-man with the owner need not be recorded. The law requires the agreement between the "owner and his contractor to be in writing and recorded," but a material-man is not a contractor within the meaning of this law, for he does not come within its reason which is to protect the liens of the contractor's sub-contractors.<sup>3</sup> One who agrees with the owner of a factory to furnish and put in place certain machinery is a material-man, and his contract need not be in writing nor recorded.<sup>4</sup>

§ 121 *b*. In Texas the contract may be recorded before the debt becomes due or after. The statute provides: "In order to fix and secure the lien herein provided for, the person or firm, contractor, mechanic, laborer, artisan, or lumber dealer furnishing material shall have the right, at any time within six months after such debt becomes due, to file his contract in the office of the county clerk of the county in which such property is situated, and cause the same to be recorded in a book to be kept by the county clerk for that purpose." This statute simply places a limitation of time within which the contract must be filed in order to fix the lien, and certainly was not intended to operate as a declaration that the recording of the contract before the debt was due should not be as effective, in fixing the lien, as though it was recorded after the debt became due.<sup>5</sup> The written contract to be recorded and thereby fix a lien to secure building material furnished, as provided in R. S. art. 3165, is one by virtue of which the material was furnished; and not any subsequent contract relating to the same matter.<sup>6</sup> A contract, the terms of which are put in writing, signed by one party and verbally accepted and acted on by both parties, is a written contract.<sup>7</sup> An express agreement in a mechanics' contract that he should have a lien would not create a lien until he complied

<sup>1</sup> [Kiessig v. Allspaugh, 91 Cal. 234.]

<sup>2</sup> [Reed v. Norton, 90 Cal. 590, 599.]

<sup>3</sup> [Hinkley v. Fields' Biscuit, &c. Co., 91 Cal. 136, 139.]

<sup>4</sup> [Id.]

<sup>5</sup> [Mundine v. Berwin, 62 Tex. 341, 343.]

<sup>6</sup> [Lyon & Gribble v. Ozee, 66 Tex. 95.]

<sup>7</sup> [Martin v. Roberts, 57 Tex. 564.]

with the provisions of the statute as to recording the contract, etc.<sup>1</sup> A contract made after the work was done may be recorded to fix a lien as well as a contract put in writing before the work was done.<sup>2</sup> A record of the contract must be made in the county clerk's office within six months after the debt becomes due.<sup>3</sup> A record of "all but a few lines of the plans and specifications attached to the obligation" is sufficient. The omission is immaterial.<sup>4</sup> The terms of a verbal contract need not be set out and recorded.<sup>5</sup>

§ 122. **Contract must not look exclusively to Personal Responsibility of the Owner.** — While it is not essential to its creation that the parties should have in immediate view the right of lien, the law contemplates a contract or agreement more specific than the mere purchase of materials in the ordinary course of trade. The parties should mutually understand that they are to be used, and are furnished to be used, about the erection or reparation of a building.<sup>6</sup> When a lien is given for labor performed or materials furnished "by virtue of a contract or agreement," by the term "contract" is meant something more than a mere agreement to do work or sell goods. The contract is one that has reference to the purpose for which the work is to be done; namely, "the erection, alteration, or repair of a building." The case is quite otherwise where the contract has no such relation. Should a man's domestic patch a window or mend a lock in his employer's house, or a farmer's hired man make or repair a door of his barn, no lien attaches in either case. So if a materialman sell his materials with no understanding, express or implied, as to their application, he can assert no lien upon the building in which they may be placed. He trusts to the responsibility of the buyer alone, and takes no security. He sells, not for the special purpose named in the statute "construction," but for any purpose that may seem best to the buyer. It is only where the materials are furnished for a purpose named in the act that a lien is acquired.<sup>7</sup> Accordingly, a mechanics' lien under a statute that "any person who shall by contract with the owner of any piece of land . . . furnish labor or materials for erecting or repairing any building . . . shall have a lien upon the land," etc., does not exist for materials furnished upon an open general account, and without reference to their being put

<sup>1</sup> [Cameron & Co. v. Marshall, 65 Tex. 7.]

<sup>2</sup> [Mundine v. Berwin, 62 Tex. 341.]

<sup>3</sup> [Cameron & Co. v. Marshall, 65 Tex. 7.]

<sup>4</sup> [Martin v. Roberts, 57 Tex. 564.]

<sup>5</sup> [Pool v. Wedemeyer, 56 Tex. 287.]

<sup>6</sup> Cotes v. Shorey, 8 Iowa, 416.

<sup>7</sup> Choteau v. Thompson, 2 Ohio, 114.

into some building; as it would be no violation of the agreement of purchase in such case if the materials bought had been used in making furniture or any other personal property.<sup>1</sup> Under a law that "any person who furnishes labor or materials for building, etc., shall have a lien on it therefor," etc., the lien is an incident to a contract, and cannot exist without it, and is an element of the contract, the same as though specially agreed by the parties; but if the materials are sold generally without any reference to the use to be made of them, no such element can be attached.<sup>2</sup> When the law gives a lien for materials furnished "for any building or improvement on land," the lien attaches only where the materials have been furnished for the purpose to which they are devoted, and "does not arise where they have been supplied on the general credit of the purchaser, and without reference to any contract, express or implied, for their use in a particular building or the improvement of certain land."<sup>3</sup> The right of a material-man to a lien depends upon whether he gave credit on the faith of the structure into which the material entered.<sup>4</sup> So where "every dwelling-house, etc., constructed . . . shall be subject to the payment of all debts contracted for, or by reason of any work done, or any materials found by bricklayer, . . . or any other person employed in erecting or furnishing materials in the erection," etc., and materials were sold generally to a person on account, without reference to the use to be made of them, the vendor had no lien on the building of an individual in whose property they were incorporated; and this, though they were used upon the separate property of the purchaser's wife.<sup>5</sup> So if a lumber-merchant purchases on credit a number of boards to sell and make profit, but changes his intention and erects houses, and uses the boards therein, the creditor for this lumber has no lien on the houses.<sup>6</sup> Again where "any person who shall under contract with the owner of any tract of land furnish material for erecting any building," etc., and a vendor sells lumber on credit without reference to what shall be done with it, and the vendee afterwards uses it in constructing a building on land belonging to himself, the vendor has no lien on the same, which will be prior to the lien of a subsequent mortgage. It should have been sold *for* the

<sup>1</sup> Hill v. Bishop, 25 Ill. 349.

<sup>2</sup> Fuller v. Nickerson, 69 Me. 236;  
Mehan v. Thompson, 71 Me. 492; [Rogers  
v. Currier, 13 Gray (Mass.), 129.]

<sup>3</sup> [Eufaula Water Co. v. Addyston  
Pipe & Steel Co., 89 Alabama, 552, 555;

citing Tyler v. Jewett, 82 Alabama, 93, 100,  
etc.]

<sup>4</sup> [Rand v. Grubbs, 26 Mo. App. 591.]

<sup>5</sup> Esslinger v. Huebner, 22 Wis. 632.

<sup>6</sup> Hills v. Elliott, 16 Serg. & R.  
(Penn.) 56.

building, with the intention and understanding that it should be used in constructing it.<sup>1</sup>

§ 123. **Nor of Contractor.** — Materials furnished exclusively on the credit of a contractor are not secured by this lien.<sup>2</sup> Under a lien law providing that "every building, for the construction or repair of which any person shall have furnished materials or rendered services, shall be subject to the payment of the claim of such services," it is essential that the materials furnished be not sold on the personal credit of the contractor, as with sales in general, but with reference to the improvement of some land or building.<sup>3</sup> So, where the building is "subject to a lien for the payment of all debts contracted for work done on the same, or materials furnished," materials must be furnished with the understanding that they are to be used in the building.<sup>4</sup> "Every mechanic or other person who shall do or perform any work . . . upon, or furnish any materials . . . for any building . . . under or by virtue of any contract with the owner or proprietor, or his agent, trustee, contractor, or sub-contractor, . . . shall have a lien," etc., does not secure the original vendor a lien, who sells materials to A. on his own private liability, who in turn sells them to B., who furnishes them to a contractor for a building.<sup>5</sup> So, where the lien is given for materials "furnished the owner of a building," it only attaches to the building or improvement erected by the purchaser with the materials, and does not follow them into the hands of a vendee of the purchaser and attach to a building he may use them to erect, although the vendee was aware they had not been paid for.<sup>6</sup> To the same effect a mechanics' lien will include only labor and materials furnished by a lienor, or by others employed by him, and not materials or labor procured by him as the agent for the owner, and in his name and on his credit, although afterwards actually paid for by the lienor.<sup>7</sup> Where M. contracted to build a house for G., and bought lumber in his own name, and not as agent for G., no lien could be claimed against G.'s land.<sup>8</sup> Whether materials for which a mechanics' claim has been filed were furnished on the credit of the building or that of the contractor is a question for the jury.<sup>9</sup> The jury

<sup>1</sup> *Weaver v. Sells*, 10 Kans. 609, affirmed in *Delahay v. Goldie*, 17 Kans. 265.

<sup>2</sup> *Presbyterian Church v. Allison*, 10 Penn. 413; *Wetherill v. Ohlendorf*, 61 Ill. 283.

<sup>3</sup> *Chapin v. Persse*, 30 Conn. 461; *Lawton v. Case*, 73 Ind. 60.

<sup>4</sup> *Lanier v. Bell*, 81 N. C. 337.

<sup>5</sup> *Hause v. Carroll*, 37 Mo. 578.

<sup>6</sup> *Heaton v. Horr*, 42 Iowa, 187.

<sup>7</sup> *Kerby v. Daly*, 45 N. Y. 84.

<sup>8</sup> *[Doolittle v. Goodrich]*, 13 Neb. 297.]

<sup>9</sup> *[Hommel v. Lewis]*, 104 Penn. 465.]

must be satisfied that the materials were furnished on the credit of the building, and not merely on the personal credit of the contractor, or there will be no lien for them.<sup>1</sup> If materials are sold to B. on his sole credit, for the building of a house on his wife's land, no lien exists.<sup>2</sup> But supplying materials on the credit of the contractor is not a waiver of the lien. It must appear that personal credit *alone* was looked to.<sup>3</sup>

§ 124. **Proof of Character of Contract by Contractor or Material-man.** — This intention to sell upon personal credit must be made to appear affirmatively by the party who asserts it. Where materials are furnished and placed in a building, if there be nothing showing a different intention, a jury would be warranted in finding that they were furnished to be used in such building.<sup>4</sup> So, if it appear that materials furnished were used in the erection of the building on which a lien is claimed, unless it is shown that they were intended for another purpose, it will be presumed that they had been contracted for to be used in the building.<sup>5</sup> To establish the character of the sale in this regard, it may be shown by evidence of an express agreement, or by proof of circumstances from which the purpose may be inferred. A tacit understanding will be as good as an express one.<sup>6</sup> A jury may be satisfied that the materials were sold for the erection of a building, without the introduction of direct and positive proof of the fact.<sup>7</sup> It is not necessary for a material-man to allege in his lien or to prove affirmatively that his materials were furnished upon the credit of the building, if it be shown that they were furnished for and entered into its construction. The burden is then on the defendant to show that they were furnished on the credit of the contractor alone. The fact that the materials are charged on the plaintiff's books to the contractor alone affords some slight evidence that they were furnished on his credit, but is not *prima facie* evidence that his credit was relied on to the exclusion of the credit of the building.<sup>8</sup> Entries in books of the charges of materials are strong evidence to show to whom they were sold, but are not conclusive. Conformably to the general rule of evidence, the receipts, entries in book, or other memoranda given for work and materials, may be explained, modified, or made to comport with truth,

<sup>1</sup> [Mulrine v. Washington Lodge, 6 Houston (Del.) 350, 354; Duncan Bros. v. Aaron, Id. 566.]

<sup>2</sup> [Little v. Vredenburg, 16 Bradw. 189.]

<sup>3</sup> [Deatherage v. Henderson, 43 Kan. 684, 688; Sodini v. Winter, 32 Md. 130.]

<sup>4</sup> Power v. McCord, 36 Ill. 214; [Deatherage v. Henderson, 43 Kan. 684, 688.]

<sup>5</sup> Martin v. Eversal, 36 Ill. 222.

<sup>6</sup> Choteau v. Thompson, 2 Ohio, 114.

<sup>7</sup> Cotes v. Shorey, 8 Iowa, 416.

<sup>8</sup> [Hommel v. Lewis, 104 Penn. 465.]

by parol evidence.<sup>1</sup> So that a lien given to a material-man for his articles furnished is not waived or extinguished by the bare fact that the materials were charged in a book against the contractor, and not against the building.<sup>2</sup> This is particularly the case where, from frequency of loss by mechanics and dealers, in consequence of the employment of middlemen or contractors, the legislature is induced to give a lien on the building "for the payment of all debts contracted for work done or materials furnished about the same." Under this statute, the mere fact that the materials were furnished on the credit of the contractor, and not on the credit of the building, is not an extinguishment or waiver of the lien. So a declaration by a material-man, releasing the owner from liability for materials furnished, and stating that he looked only to the contractor, is simply a parol relinquishment, without consideration, of a valuable right, and is altogether ineffectual to constitute a waiver of the lien.<sup>3</sup> Where it was shown by the declaration of a laborer that he looked to the owner and not to the contractor for his pay, it was also accordingly held to be insufficient to release the latter from liability, when it was proved he was employed, directed as to his work, and partly paid by the contractor.<sup>4</sup>

§ 125. **By those farther removed from Owner.**—No presumption is usually made to establish a lien in favor of those who are still more remotely connected with furnishing labor or materials to a building. Thus, where "any person who shall furnish materials for the construction of such building," etc., and iron is furnished generally by an ironmonger to a founder, who manufactures it into railings, which he applies to the construction of a building, the ironmonger has no claim under the mechanics' lien law, — he must look to his vendee for payment. It can readily be perceived how the bricklayer and the lumber-merchant or the stone-quarryer may be said to be within the meaning, as well as the spirit, of the statute. But there must be a limit to the right conferred, or it would become so complicated that it could not be enforced. The contractor who agrees to paint a building may purchase the constituent parts of the materials he uses of different persons: one may furnish the oil, another the pigment; but when all are combined, there certainly ought not to be a lien in behalf of each vendor. This principle may be followed out until it is applied to every department of business;

<sup>1</sup> *Presbyterian Church v. Allison*, 10 Penn. 413.

<sup>2</sup> *Id.*

<sup>3</sup> *Sodini v. Winter*, 32 Md. 130.

<sup>4</sup> *Maxey v. Larkin*, 2 E. D. Smith (N. Y.), 540.

and, as the benefit of the statute cannot be extended to all without defeating its real object, the remedy must be confined within reasonable, as well as practicable, limits.<sup>1</sup> So, where work was done for third persons, it has been decided, under a statute which gave "a lien for labor performed in the erection of any building," that no mechanics' lien existed for labor performed by owners of a planing-mill, when no agreement existed between the parties as to the use to which the lumber should be put; although it was in fact afterwards used in a building which was in erection for another person under a contract, it not appearing that there was any prior stipulation that the lumber should be appropriated to said building.<sup>2</sup> The fact that G. subsequent to the contract entered into partnership with B., and that the latter was the legal successor of said firm, did not create a contract relation between him and S., or authorize him to file a lien for work done under a contract between G. and S.<sup>3</sup>

§ 126. **When no Particular Building need be contemplated by the Contract.** — Although the authorities almost universally establish the proposition that the materials must have been sold or labor performed for building purposes upon the credit of a building, it is not essential that the land or building should be described in the contract, unless the statute itself contemplates it.<sup>4</sup> Indeed, the particular building may not be in the minds of the parties when the contract is made, and yet a lien may arise; as if a builder should be employed to erect a house, the plan or site of which was not determined, or to construct such buildings as the employer might thereafter wish constructed, or to make such alterations or repairs as might be required; or, as if a material-man agree to furnish materials, or a laborer to perform work under similar contracts, — in all these cases, and others that might be mentioned, a lien exists, though the particular building may not have been designated when the contract was made.<sup>5</sup> The same construction has been given to a law providing that "every person, who, by virtue of a contract with the owner of a piece of land, performs work or furnishes materials especially for any building," the words "especially for any building," meaning materials furnished for building purposes, as contradistinguished from furnishing for general or unknown purposes, rather than that the materials shall be fur-

<sup>1</sup> Horton *v.* Carlisle, 2 Disney (Cin.), 184.

<sup>2</sup> Bennett *v.* Shackford, 11 Allen (Mass.), 444.

<sup>3</sup> [Bohem *v.* Seabury, 141 Penn. 594.]

<sup>4</sup> Montandon *v.* Deas, 14 Ala. N. S. 33.

<sup>5</sup> Choteau *v.* Thompson, 2 Ohio, 114.



nished for any particular building.<sup>1</sup> The contract need not specify the lot on which the work is to be done. This may be shown by parol proof of what was done under the contract.<sup>2</sup> One who agrees to furnish materials for a building, and thereon does so, will not be deprived of a mechanics' lien by reason of the fact, that the building was not specified at the time he agreed to furnish the materials, and that he did not then know the location, character, or ownership of it. "The statute (R. S., sec. 3172) gives a lien to 'every mechanic, or other person, who shall do or perform any work or labor upon, or furnish any materials, fixtures, engine, boiler, or machinery for any building, erection, or improvements upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor,' etc. It is perceived that the right of lien, which the statute extends to a material-man, is predicated upon his furnishing materials for the building. We think that the contractor may fairly be regarded as furnishing materials for a certain building, when he knows that they are to go into a building, although he may not at the time of making the contract know the location, character, or ownership of the building into which they are to go. Especially we think he may be regarded as furnishing the materials for the particular building, where each load is delivered at the building, and where, at the time of each successive delivery, he is cognizant of the location and identity of the building, at and for which materials were delivered. We do not think that the language of the statute requires us to hold that, in order to secure his lien, he should contract to furnish the materials for a building, designated or described in the contract itself. We do not think that what is held or said in any of the following cases requires us to adopt a more stringent rule: *Simmons v. Carrier*, 60 Mo. 581; *Hause v. Carroll*, 37 Mo. 579; *Graves v. Pierce*, 53 Mo. 429. These cases indeed go to the extent of holding that two things must concur in order to the existence of the lien: (1) A contract to furnish the materials; (2) A furnishing of the materials for the building. But this court went so far as to hold, in the later case of *Bruce v. Burg*, 8 Mo. App. 204, that the contract itself need not be expressed, but may be implied. This is quite inconsistent with the idea that the contract must designate the building for which the materials are furnished."<sup>3</sup>

<sup>1</sup> *Cotes v. Shorey*, 8 Iowa, 416; *Atkins v. Little*, 17 Minn. 353.

<sup>2</sup> [*Burns v. Lane*, 23 Ill. App. 504, 507.]

<sup>3</sup> [*Schulenburg & Boeckler Lumber Co. v. Johnson*, 38 Mo. App. 404, 406, 407.]

§ 127. **When some Particular House or Lot must be contemplated by the Contract.** — If it seem to be the intention of the statute,<sup>1</sup> as where “any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any building on such land or lot, shall have a lien upon the whole tract of land or town lot,” the contract must have reference to some particular tract or town lot, in order that the lien may take effect.<sup>2</sup> A like adjudication was made when the law provided that “all master-builders, mechanics, lumber-merchants, and all other persons performing labor or furnishing materials for the construction or repair of any building or wharf, shall have a lien,” etc.<sup>3</sup> And a similar decision under the following: “Any person who shall furnish materials for the construction of such building, whose demand has not been paid, may file,” etc.<sup>4</sup> Where a statute provides that “every building erected shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same,” the materials must be furnished on the credit of a particular house, and such must be the understanding at the time, though fraud between the owner and contractor would perhaps excuse the want of this particularity.<sup>5</sup> In Indiana, under a statute giving a lien to “mechanics and all persons performing labor or furnishing materials for the construction or repair of any building,” it has been held that to entitle a material-man to a lien on a building, he must show that the materials were furnished for the particular building upon which he seeks to obtain a lien. It is not enough that he has furnished materials which have been used in the building; he must show that they were furnished for that particular building.<sup>6</sup> Nor can the lien be had upon one building for materials furnished for and used in another.<sup>7</sup> Where brick has been furnished to contractors generally and used by them indiscriminately in various buildings which they were constructing, the party furnishing the brick not doing so with the intention to supply them for any particular building, he cannot claim a lien upon any of such buildings.<sup>8</sup> Nor is it sufficient in such case that the material-man, in furnishing materials for the

<sup>1</sup> *Hammond v. Wells*, 45 Mich. 11.

<sup>2</sup> *Burkhart v. Reisig*, 24 Ill. 529.

<sup>3</sup> *Bottomly v. Grace Church*, 2 Cal. 90;  
*Houghton v. Blake*, 5 Cal. 240.

<sup>4</sup> *Horton v. Carlisle*, 2 Disney (Cin.),  
184.

<sup>5</sup> *Hills v. Elliott*, 16 Serg. & R. (Penn.)  
56.

<sup>6</sup> *Hill v. Sloan*, 59 Ind. 186; *Miller v. Roseboom*, id. 345.

<sup>7</sup> *Hill v. Braden*, 51 Ind. 72.

<sup>8</sup> [*Eisenbeis v. Wakeman*, 3 Wash.  
534.]

construction of several different buildings, on a general account with the contractor, has kept an itemized statement of the different materials used in each of said buildings, as the same were distributed by the direction of the contractor or owner.<sup>1</sup> The complaint must allege and prove that such materials were furnished specially for that building.<sup>2</sup> But where an agreement under seal was entered into by several persons, principally mechanics and material-men, in which, after reciting that they had each agreed to erect a brick house on a certain lot, the houses to be built of uniform materials and appearance, and further that each subscribing party would furnish to the others certain materials and workmanship to be used, and that no lien should be filed or claim made against either of the other parties for any labor or materials furnished, "except against the party, or for the buildings which each shall have agreed to erect, and for such labor and materials only as shall be contained in such building respectively," and one of the parties filed a lien against the house of another for lumber, — it was held not to be necessary to prove that the particular articles were furnished to the house in question, — that from the fact that the agreement looked to a general furnishing of materials to be used indifferently in any of the houses, the terms of the agreement were satisfied if the party were not charged with more than his due proportion of the materials, and that this formed a proper basis for lien.<sup>3</sup> It is sufficient if the material is sold with the understanding that it is to be used for a certain building. No *express* agreement to use it in that building is necessary.<sup>4</sup> But it is not sufficient to allege that the materials went into the building described, without also alleging that they were furnished for that building.<sup>5</sup>

§ 128. **Contract need not specify Items.** — It is not necessary that the contract for the supply of labor and materials should contemplate or specifically name the items to be furnished, in order to acquire the lien. They may be supplied from time to time as needed, and, when furnished to the owner or proprietor, may be charged in the builder's or mechanic's books, in the same manner that he charges his other customers generally.<sup>6</sup>

<sup>1</sup> Talbott v. Goddard, 55 Ind. 496.

<sup>2</sup> City of Crawfordsville v. Lockhart, 58 Ind. 477; City of Crawfordsville v. Brundage, 57 Ind. 262; Talbott v. Goddard, 55 Ind. 496; Hill v. Ryan, 54 Ind. 118.

<sup>3</sup> Croskey v. Coryell, 2 Whart. (Penn.) 223.

<sup>4</sup> [Sturges v. Green, 27 Kan. 235, 237.]

<sup>5</sup> [Fathman, &c. M. P. M. Co. v. Ritter, 33 Mo. App. 404.]

<sup>6</sup> Jones v. Swan, 21 Iowa, 181; Stockwell v. Carpenter, 27 Iowa, 119.

But where a lien is given to a material-man on a contract with a contractor, it is eminently proper the charges should be made in such manner that the owner, if he apply to the material-man before he pays the contractor, may be able to discover the liability of his house; though it is not necessary that the sale and delivery of materials should be charged in a book of original entries. Any evidence which satisfies a jury they were furnished for and about the erection or construction of the building is sufficient. To the inquiry whether there is a lien or not, it cannot therefore be essential in what manner the sale and delivery of the materials were charged at all. It would, however, be all-important if the book were the only allowed instrument of proof that credit was given to the building; but such is not the case, as any competent evidence of the fact is admissible.<sup>1</sup>

§ 129. **Contract need not be for Payment in Money.**<sup>2</sup>— Although ordinarily the contract stipulates for payment in money by the owner, it is not essential.<sup>3</sup> Thus, where the law is that there shall be a "lien upon the land for the amount due for work or materials," a mechanics' lien may be enforced where payment is to be made in land or any specific article of property, or in money. There is no distinction in principle between the agreement to pay money or property, which can possibly affect the remedy provided. If the labor has been performed, no matter in what the owner agreed to pay, if he has not paid, the mechanic or laborer has a right to resort to the security provided by law. A different rule would be unreasonable and unjust. It would be in the power of the owner, providing he could find mechanics willing to contract for property, to defraud them out of their labor, by refusing to pay in the manner required. Therefore, where a person agreed to enter forty acres of land for a builder, in payment for digging a cellar, but neglected to enter the land and refused to pay the money, the builder was entitled to a lien.<sup>4</sup> Again, where buildings are "subject to the payment of the debts contracted for, or by reason of, any work done or materials found," a contract that the price was to be paid part in money and part in lumber does not prevent the operation of the act, as it is a liquidated debt, the amount of the account being the standard of damages. If the claim had been for unliquidated damages of an uncertain nature, it would probably have

<sup>1</sup> Wolf v. Batchelder, 56 Penn. 87.

<sup>2</sup> This section was cited with approbation in Weaver v. Demuth, 40 N. J. L. 240; and McLaughlin v. Reinhart, 54 Md. 78-81.

<sup>3</sup> Barrows v. Baughman, 9 Mich. 213; Dowdney v. McCullom, 59 N. Y. 367; McLaughlin v. Reinhart, 54 Md. 78.

<sup>4</sup> Reiley v. Ward, 4 Iowa, 21.

not included such a demand.<sup>1</sup> So where it was stipulated that payment was to be made partly in goods and partly in money;<sup>2</sup> and again the lien was sustained, though it was agreed the work was to be paid for in a house.<sup>3</sup> If two mechanics agree to do work for the buildings of each other respectively, and, when done, to settle their accounts, and the balance to be paid by the party who should be found in arrear, which balance was never struck, this is clearly a "debt contracted" in the erection of the building, for which a lien exists. A debt may be contracted, though it may be the subject of set-off, founded on a *quantum meruit*, in which case the amount due is unliquidated.<sup>4</sup> In another State it was held that a mechanics' lien might exist as a security for the conveyance of lots in payment of work done upon a house, as well as for the payment of money for the same work.<sup>5</sup> But where a contractor engaged to construct a building in consideration, in whole or in part, of a debt then due from him to the employer, and of a sum to be paid him by employer upon execution of the contract, that portion of the contract price represented by the debt cannot become a lien upon the building.<sup>6</sup>

§ 130. **When Contract must specify Time for Completion of Work.** — Inasmuch as the lien of the mechanic is, as we have seen, so entirely the offspring of statutory enactment, the courts have uniformly held, that all requirements contained in the law must be strictly complied with. Thus, where a lien was given "provided that the time of completing the contract shall not be extended for a longer period than three years, nor the time of payment beyond the period of one year from the period stipulated for the completion thereof," it is essential the contract should contain a stipulation for the completion of the work. These provisions further require that the time for its performance and the payment of the money shall be determined at the time when the contract is entered into, and not by alterations and changes which may be made in the agreement after it is entered into.<sup>7</sup> No lien shall be created when the contract is express if the time of payment is fixed beyond one year from the time agreed upon for the completion of the work. The actual time of completion and payment may be later than the times agreed, but that will not invalidate the lien, which depends not on the actual or sub-

<sup>1</sup> Hinchman v. Lybrand, 14 Serg. & R. 32.

<sup>2</sup> Campbell v. Scaife, 1 Phila. 187.

<sup>3</sup> Haviland v. Pratt, Id. 364.

<sup>4</sup> McCall v. Eastwick, 2 Miles (Phila.), 45.

<sup>5</sup> Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411.

<sup>6</sup> Dore v. Sellers, 27 Cal. 591.

<sup>7</sup> Cook v. Heald, 21 Ill. 425.

sequently agreed times, but on the terms of the original contract.<sup>1</sup> Again, in the same State it has been held, where the statute requires that the time for completing the contract must not be extended for a longer period than three years from the time of entering into the same, nor the time of payment beyond the period of one year from the time stipulated for the completion thereof, no lien will arise, if these provisions are violated.<sup>2</sup> There will be no lien where the contract is express unless it shows that the services are to be performed within three years from their commencement.<sup>3</sup> But it does not require a particular day shall be named in the contract for the completion of the work.<sup>4</sup> In later decisions under the same statute, overruling several previous ones, it has been held that a mechanic may have a lien for work done within one year from the commencement of the work, although no time is mentioned in the contract for the completion of the work.<sup>5</sup> Again, under the same law, which provides "that any person who shall by contract, express or implied, or partly expressed and partly implied, with the owner," etc., shall have a lien, etc.; but "when the contract is expressed no lien shall be created, if the time stipulated for the completion of the work is beyond three years," etc., "if implied, no lien shall be had, unless the work shall be done within one year from the commencement," etc., and there is a contract made, expressed as to materials, but silent as to time of performance, the law will imply that it was to be performed within a reasonable time, and a performance within one year is sufficient.<sup>6</sup> Where the time for completing the work was fixed by the contract when first entered into, and no time for paying the money, it might be that an implication would be raised that the payment should be made when the labor should be performed, and thus satisfy the statute.<sup>7</sup> But if the terms of the contract under such a law only required the work to be finished in a reasonable time, it is not a sufficient contract to support the lien,<sup>8</sup> for the contract must fall within the provisions of the law.<sup>9</sup> As where a

<sup>1</sup> [Paddock v. Stout, 121 Ill. 572, 579; Chisholm v. Williams, 128 Ill. 115, 120; 21 Ill. App. 312; Simon v. Blocks, 16 Bradw. 450; Cook v. Vreeland, 21 Ill. 431.]

<sup>2</sup> Beasley v. Webster, 64 Ill. 458.

<sup>3</sup> [Adler v. World's Pastime Exposition Co., 126 Ill. 373, 377; 26 Ill. App. 528.]

<sup>4</sup> Reed v. Boyd, 84 Ill. 66.

<sup>5</sup> Graham v. Meehan, 4 Bradw. (Ill.) 522; Clark v. Manning, xi Leg. N. 186; [McDonald v. Rosengarten, 134 Ill. 126;

Haines v. Chandler, 26 Ill. App. 400; Harwood v. Brownell, 32 Ill. App. 347; Lehman v. Clark, 33 Ill. App. 33; Portoues v. Holmes, 33 Ill. App. 312.]

<sup>6</sup> Austin v. Wohler, 5 Bradw. (Ill.) 300; Younger v. Louks, 7 Bradw. 280.

<sup>7</sup> Cook v. Vreeland, 21 Ill. 431; Senior v. Brebnor, 22 Ill. 252; Moser v. Matt, 24 Ill. 198.

<sup>8</sup> Coburn v. Tyler, 41 Ill. 354.

<sup>9</sup> Wendt v. Martin, 89 Ill. 140.

statute requires in cases of "express contract" that the work shall be completed within a certain time, a contract for the furnishing of materials to be used in a building, fixing the prices for the articles to be delivered, but leaving all other matters to be implied, is not an express contract within the meaning of that term in the lien law.<sup>1</sup>

§ 131. **Fraud.** — Fraud will, as in other agreements, avoid the contract, and enable the builder or owner, when injured thereby, to claim their respective rights independently of its terms. Therefore where a mechanic agreed to do certain work at a stated price, upon the representation of the person for whom the work was to be done as to amount and character of work required, and having been absent without an opportunity to examine it until after it was performed, he had a right to a lien for the actual value of the work done in excess of the price agreed upon. But if he had personally inspected the work, and discovered it to be of a different and more expensive character than represented, it would have been his duty to have notified the other party before proceeding with the labor;<sup>2</sup> so, on the other hand, when a contract is unfairly made with a builder, and the price agreed upon is exorbitant, the building is only liable for what the materials are fairly worth.<sup>3</sup> But laborers and subcontractors have no right to repudiate the contract between the contractor and owner on the ground of fraud. They cannot rescind it, and waive the contractor's claim for damages for the fraud, and sue for the value of the work and labor. They have no power to exercise that option in his behalf, and their doing so would not relieve the owner from the contractor's claim for damages for fraud as such. The liability of the owner is upon the express contract for the price fixed according to the agreement, or for damages for fraud, which latter the contractor may waive, and recover the value of the work and labor performed. So if it be conceded that the contractor may elect to waive the tort, and sue for the value of the work done, the proposition admits also that he may not make such election. While such a state of things may in some cases act as a hardship upon mechanics, yet good reasons could be given why it would be unwise to give them this right of repudiation of contract; as where a contractor, having failed to perform his contract, becomes in substance his own witness, not merely to excuse his default, but to prove a fraud on the part of the owner, by which he compels

<sup>1</sup> *Grundeis v. Hartwell*, 90 Ill. 324.

<sup>2</sup> *Martine v. Nelson*, 51 Ill. 422.

<sup>3</sup> *Odd Fellows' Hall v. Masser*, 24 Penn. 507.

the payment of much more than the whole contract price, for the benefit of himself.<sup>1</sup> An agreement between material-men and a contractor to make no defence to an action of *scire facias* on mechanics' lien claims is void, inasmuch as it is a fraud upon the owner, and against public policy.<sup>2</sup>

<sup>1</sup> Linn v. O'Hara, 1 Abb. Pr. (N. Y.) 364.

<sup>2</sup> Young v. Burtman, 1 Phila. 203.



## CHAPTER XIII.

## PERFORMANCE OF CONTRACT.

§ 132. **Lien dependent on Performance of Contract.** — It clearly appears from the preceding chapters that under the statutes of the several States the lien of the mechanic arises only by virtue of contract entered into between the owner of land, or his duly authorized agent, and the mechanic or other person who stipulates to perform the labor or furnish the materials provided for by its terms. A contract such as is contemplated by the statute having been entered into, the next inquiry arises, — how far is it incumbent on the party seeking to avail himself of the special remedy of lien to show compliance with the obligations he has assumed. There can be no doubt that when the contractor has fully performed his part of the contract, and the owner is alone in default, the lien attaches, and will be enforced to compel payment. But circumstances frequently present cases where there have been either partial or total failures on the part of one or both of the contracting parties to meet its requirements. The determination of these difficult questions has given rise to some diversity of judicial decision, and requires a consideration of not only the terms of the particular lien law under investigation, but also of the general principles governing the enforcement of contracts under similar circumstances, as it would be manifestly inequitable to enforce a lien on a contract not only where no just demand exists against the owner arising out of its performance, but in favor of a party who has failed to fulfil his own engagements. A synopsis of the law applicable to contracts, and which has generally been received to be the better doctrine, may not therefore be inappropriate in this treatise, and particularly as these general principles have largely governed the decisions of courts under the several mechanics' lien laws.

§ 133. **General Principles applicable to Performance of Contract.** — Where there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment on the other side is passed, a suit may be brought on the special contract, or a general assumpsit may be maintained;

and in the latter case the measure of damages will be the rate of recompense fixed by the special contract. If, however, the special contract remains open, — that is to say, remains unperformed, — and there is no act of fault or omission on the part of the defendant, *indebitatus assumpsit* will not lie.<sup>1</sup>

But if there has been a special contract which has been altered or deviated from in particulars by common consent, general assumpsit will lie when the work has been performed; and in such cases, if the original contract has not been wholly lost sight of as executed, the rates of compensation fixed by it will be the measure of damages as to those parts in which it can be traced in the performance; and for the new or extra work the recovery will be on a *quantum meruit*.<sup>2</sup> Where the deviations are made by consent in general, the presumption is they are made on the basis of the contract prices. If, however, the deviation has been occasioned by the faulty delay or neglect of the defendant, whereby the plaintiff has incurred greater expense, the plaintiff is not bound to the rates in the contract, but may recover according to the reasonable cost.<sup>3</sup>

If there has been a special contract which remains unaltered, and the work has been performed, but not according to the terms of the contract, so that the plaintiff could recover nothing in a special assumpsit on the contract, the question whether he can recover, in a *quantum meruit*, the value of the work to the defendant, will depend substantially upon the question whether the work done is by the defendant's consent or against it. If he has accepted and retained the work when finished, his consent is clear; if he has rejected the performance when completed, or has done nothing by which he adopts or benefits himself by the work, still it seems that if he knew of the altered work going on, and did not dissent, his assent is to be presumed.<sup>4</sup>

If there has been a special contract, and the plaintiff has performed a part of it according to its terms, and has been prevented by the act or consent of the defendant or by the act of the law, from performing the residue, he may, in general assumpsit, recover compensation for the work actually performed, and the defendant cannot set up the special contract to defeat him.<sup>5</sup> But if a person promise absolutely, without exception or qualifi-

<sup>1</sup> Cutter v. Powell, 2 Smith's Lead. Cas. 114; & Wallace's notes, 11; Dermott v. Jones, 2 Wall. 1.

<sup>2</sup> Cutter v. Powell, 2 Smith's Lead. Cas. 42; Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299.

<sup>3</sup> Merrill v. Ithaca & Owego R. R., 16 Wend. 586.

<sup>4</sup> Cutter v. Powell, 2 Smith's Lead. Cas. 42.

<sup>5</sup> Id. 43.

cation, that a certain thing shall be done at a given time, — the thing to be done being neither impossible nor unlawful at the time of the promise, — he is bound by his promise, unless the performance becomes unlawful.<sup>1</sup> The time of performance of the work stated in a building contract in writing, under seal, may be extended or waived by new sealed agreement or by parol. And such extension or waiver need not be established by positive testimony; it may be inferred from circumstances, just as extra work to be performed, or variations in the original contract.<sup>2</sup> But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special assumpsit.<sup>3</sup> The rules of law in cases of part-performance and total failure of performance of contracts, where married women are concerned and able to contract, apply the same as if they were *femes sole*.<sup>4</sup>

*First: As between contractor and owner.*

§ 134. **Substantial Performance necessary.** — A substantial performance, according to the terms and conditions agreed upon, is a condition precedent to the builder's right to maintain an action under the mechanics' lien law.<sup>5</sup> Every one has a right to build his house, cottage, or store after such model and in such style as shall best accord with his notions of utility, or be most agreeable to his fancy. The specifications of the contract become the law between the parties until voluntarily changed. If the owner, having regard to strength and durability, has contracted for walls of specified materials, to be laid in a particular manner, or for a given number of joists and beams, the builder has no right to substitute his own judgment or that of others. Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he engaged to erect. He can demand payment only upon and according to the terms of his contract; and if the conditions on which payment be due have not been performed, then the right to demand it does not exist. This rule, which denies to the contractor, who abandons the work before he has completed it, or who in completing it has

<sup>1</sup> *Dermott v. Jones*, 2 Wall. 1.

<sup>2</sup> *Meehan v. Williams*, 36 How. (N.Y.) 73.

<sup>3</sup> *Cutter v. Powell*, 2 Smith's Lead. Cas. 44.

<sup>4</sup> *Vail v. Meyer*, 71 Ind. 159.

<sup>5</sup> *Lombard v. Johnson*, 76 Ill. 599.

substantially departed from what was agreed upon, any remuneration for what he has done, is one in respect to which great diversity of opinion has existed. The obligation in such a case of the party who has the possession and enjoyment of the labor and materials of another, to make at least some compensation for what he has received after a full and liberal allowance has been made to him for any damage he may have sustained by the non-performance of the contract in its entirety, has been upheld by the judicial tribunals of Massachusetts<sup>1</sup> and New Hampshire.<sup>2</sup> The more rigid rule to which New York has adhered has its foundation in the policy of securing the full and faithful performance of contracts where the contract clearly and expressly specifies what is to be done, for the reason that a more lax and less rigid rule would afford encouragement to parties to abandon or execute their contracts as their interest or caprice dictated; and, though it may inflict upon the defaulting contractor a very heavy pecuniary punishment by giving to the other party what the contractor has done without paying anything for it, still it is said, that consideration is unimportant weighed against its healthy and beneficial effect as a general rule. The rule, however, can be applied only in cases where a special contract has been entered into between the parties.<sup>3</sup> In an action to foreclose a mechanics' lien, it appeared that the plaintiff refused to perform certain portions of the work agreed to be done by him under his contract with the defendant, although requested by the defendant to perform it. Held, that the plaintiff was not entitled to recover for the work done; although the defendant lived in the building upon which the work was done during its performance, and in some things directed the manner of its execution, it did not constitute a waiver of the fulfilment of the contract.<sup>4</sup> Performance of the contract or a valid excuse must be alleged.<sup>5</sup> But a trivial imperfection in the work done will not prevent the foreclosure of a lien. If the contract is substantially performed, and the owner can be compensated by recoupment of damages, for any slight omission or imperfection, the right of action and of lien will not be affected.<sup>6</sup> The lien will attach, although the work done is not done in the skilful and workmanlike manner agreed for.<sup>7</sup> A defect in fastening

<sup>1</sup> *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Cong. Meeting-house* in Lowell, 8 Pick. 178.

<sup>2</sup> *Britton v. Turner*, 6 N. H. 481.

<sup>3</sup> *Smith v. Brady*, 17 N. Y. 173; *Smith v. Coe*, 2 Hilt. (N. Y.) 365.

<sup>4</sup> *McNeal v. Clement*, 2 Thomp. & C. (N. Y.) 363.

<sup>5</sup> [*Bohen v. Seabury*, 141 Penn. 594.]

<sup>6</sup> [*Harlan v. Stufflebeem*, 87 Cal. 508.]

<sup>7</sup> [*Beha v. Ottenberg*, 6 Mackey, (D. C.) 348.]

some of the tiles of the sides of the house is not such a failure of "substantial performance" as to defeat a lien.<sup>1</sup> "The question of substantial performance depends somewhat on the good faith of the contractor. If he has intended and tried to comply with the contract, and has succeeded, except as to some slight things omitted by inadvertence, he will be allowed to recover the contract price, less the amount necessary to fully compensate the owner for the damages sustained by the omission."<sup>2</sup> "When there is a wilful refusal by the contractor to perform his contract and he wholly abandons it, and after due notice refuses to have anything more to do with it, his right to recover depends upon performance of his contract, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. While slight and insignificant imperfections or deviations may be overlooked on the principle of *de minimis non curat lex*, the contract in other respects must be performed according to its terms. When the refusal to proceed is wilful the difference between substantial and literal performance is bounded by the line of *de minimis*."<sup>3</sup> The same rules apply to a sub-contract. When the sub-contractor sues the owner, and his account is disputed by the general contractor, he must prove that he has fulfilled his contract with the contractor in respect to time of furnishing materials, etc.<sup>4</sup>

§ 135. **Instances thereunder.**—The rule is well established that where a party by his own contract creates a duty or charge upon himself, not absolutely impossible, his undertaking must be substantially complied with under any and all circumstances. To excuse a performance, his contract must provide for it.<sup>5</sup> To illustrate the extent to which this obligation is binding, and the principles on which they were decided, the following cases are given. Where one had agreed to build a house on the land of another, and had substantially performed his contract, but had not completely finished the house nor delivered it, when it was destroyed by fire, he was held liable to an action by the owner for money advanced on the contract, and damages for its non-

<sup>1</sup> [Leeds v. Little, 42 Minn. 414, 419, 420.]

<sup>2</sup> [Van Clief v. Van Vechten, 130 New York, 571, 579; Woodward v. Fuller, 80 Id. 312; Nolan v. Whitney, 81 Id. 648; Phillip v. Gallant, 62 Id. 256, 264; Glacius v. Black, 50 Id. 145; s. c. 67 Id. 563, 566; Johnson v. De Peyster, 50 Id. 666; Sinclair v. Tallmadge, 35 Barb. 602.]

<sup>3</sup> [Van Clief v. Van Vechten, 130 N. Y. 571, 579; Smith v. Brady, 17 Id. 173;

Cunningham v. Smith, 20 Id. 486; Bonesteel v. Mayor, &c., 22 Id. 162; Walker v. Millard, 29 Id. 375; Glacius v. Black, 50 Id. 221; Catlin v. Tobies, 26 Id. 217; Husted v. Craig, 36 Id. 221; Flaherty v. Miner, 123 Id. 382; Hare on Contracts, 569; Leake on Contracts, 821.]

<sup>4</sup> [Kirn v. Champion Iron Fence Co., 86 Va. 608.]

<sup>5</sup> Bacon v. Cobb, 45 Ill. 47.

performance. No property in the building vested in the owner of the land until it was finished and delivered.<sup>1</sup> So where a party contracted to erect and finish a building, and deliver it as such, he was not excused, by its accidental destruction by fire, from performance. After the conflagration the contractor might have proceeded under the contract; and, if he had completed a house according to the terms of his agreement, the plaintiff would have been bound to perform his part of the stipulation.<sup>2</sup> Again, where a party had agreed to build and complete a school-house by a certain time, and had nearly completed it when the building was destroyed by lightning, whereby alone he was prevented from performing his contract, which was absolute in its terms, the non-performance was not excused by such destruction of the building.<sup>3</sup> And where a contract was made to build and complete a building, and find materials for a certain entire price, payable in instalments as the work progressed, it was held that the contract was entire; and if the building, either by the fault of the builder or by inevitable accident, were destroyed before completion, the owner could recover back the instalments paid, though the falling down and destruction was by reason of a latent defect in the soil.<sup>4</sup> Similarly to the foregoing, it was held in a leading case that performance of a contract to build a house for another on the soil of such person, and that the work shall be executed, finished, and ready for use and occupation, and be delivered over so finished and ready to the owner of the soil, is not excused by the fact that there was a latent defect in the soil, in consequence of which the walls sank and cracked, and the house, having become uninhabitable and dangerous, had to be partially taken down and rebuilt on artificial foundations.<sup>5</sup> So if no payment were to be made till the work was completed, which was never done, the mechanic cannot recover for the work performed.<sup>6</sup> But these cases do not apply when the contractor has not undertaken to erect and finish a building and deliver it; and in such case, when he is entitled to payment as the work progresses, all that he fully performs before the accident he is entitled to receive notwithstanding.<sup>7</sup> So under a contract to do carpenter's work only, the risk of destruction by fire being assumed therein by the owner, and the building is destroyed by fire, so that the workman is prevented, without fault on his part, from

<sup>1</sup> *Tompkins v. Dudley*, 25 N. Y. 272.

<sup>2</sup> *Adams v. Nicholl*, 19 Pick. 275.

<sup>3</sup> *School Dist. No. 1 v. Dauchy*, 25 Conn. 530.

<sup>4</sup> *School Trustees of Trenton v. Bennett*, 3 Dutch. (N. J.) 513.

<sup>5</sup> *Dermott v. Jones*, 2 Wall. 1.

<sup>6</sup> *Appleby v. Meyers*, 2 L. R. C. P. 651.

<sup>7</sup> *Schwartz v. Saunders*, 46 Ill. 18.

completing his contract, a decree giving him a lien on the lot for the sum due him for work and materials will not be disturbed.<sup>1</sup>

§ 136. **When Contract is to be performed with Approval of Architect, etc.**—If parties impose terms upon themselves by express provisions of contract in regard to what shall be deemed a satisfactory performance of the contract they will be binding upon them. Thus, where a contract makes the architect the arbiter of the proper performance of work and the times of payment, his decision is conclusive on all parties, unless it can be shown that it was obtained by collusion or fraud.<sup>2</sup> Again, where a contract stipulates that the work shall be done to the satisfaction of an architect, this approval is a condition precedent to a right to recover on the contract and must be shown, unless fraud or collusion between the architect and the defendant is made out to the satisfaction of the jury. And although the work is paid for in instalments on the certificate of the architect, which are given from time to time as the work progressed, it does not dispense with the final certificate of the architect that the work is completed according to contract.<sup>3</sup> Where a sub-contractor makes a further sub-contract, and his sub-contractor does not do his work to the satisfaction of the architect, whose decision is final, whereupon the principal contractor employs others to do the work, charging the expenses to his sub-contractor, and there is nothing due the sub-contractor on his contract, he has no lien.<sup>4</sup> As before stated, if the architect unreasonably or in bad faith decline to give the certificate, this should be averred, and, if proved, will dispense with it.<sup>5</sup> A contract contained this provision: "No extra work to be paid for unless the price has been fixed by the parties, the work named, and the agreement made at the time the extra work is done." There was no price fixed, or agreement made. The court held that there was no lien.<sup>6</sup> So, if a contract stipulates that no payment is to be considered as due if at the time there are any liens on the building in consequence of the acts of the contractor, the latter will be held to the performance of this stipulation, and there can be no lien as long as he is in default.<sup>7</sup> It is error to refuse to allow the defendant to show that the plaintiff did not follow the plans and specifications to the injury of the defendant. The architect's certificate is not conclusive on this point.<sup>8</sup> The claimant must abide by

<sup>1</sup> Sontag v. Brennan, 75 Ill. 279.

<sup>2</sup> Dingley v. Greene, 54 Cal. 333.

<sup>3</sup> Barton v. Hermann, 11 Abb. Pr. N. S.

378.

<sup>4</sup> Weeks v. Little, 47 N. Y. Supreme Ct. 1.

<sup>5</sup> Thomas v. Fleury, 26 N. Y. 26.

<sup>6</sup> Meigs v. Bruntsch, 54 Cal. 601.

<sup>7</sup> Holmes v. Richet, 56 Cal. 307.

<sup>8</sup> [Davidson v. Provost, 35 Ill App.

the architect's certificate, unless he can show fraud or mistake. And if the unimpeached certificate shows that the claimant has not performed his contract, no lien will be declared.<sup>1</sup>

§ 137. **Completion and Abandonment.** — The general principles affecting contracts are sometimes modified or enforced in their application to the lien law by the statute itself which authorizes the lien. As where a statute looks to the completion of the contract by providing that "the time for completing the contract must not extend over three years, or of payment beyond more than one year after completion," notwithstanding his common-law remedies on the contract for the work performed, it was said the contractor, to avail himself of the lien, must complete the work contemplated by the contract, unless prevented by the other party.<sup>2</sup> Again where by the law the work is to be completed before the lien can be filed, if an essential part of the contract remain unperformed through the fault of the contractors, as the failure to pencil the walls, an attempt to enforce the lien is premature.<sup>3</sup> Where the lien was given upon "the completion of the contract for labor," and a bricklayer completed his contract to do the brick-work of a house, it was held that he was entitled to the protection of the statute.<sup>4</sup> Where, however, the contract is entire, and the building is substantially finished, and is treated by all the parties as completed, although something unimportant or not of the essence of the contract may remain undone, the building is considered in law as finished, and more especially if intervening rights have attached in favor of third persons. In all these cases, if there has been a substantial compliance with the contract, and the work has been mainly completed, the builder may secure to himself the benefits of the lien, although the words of the statute are that the lien is given to those who "shall, in conformity with the terms of such contract, perform any labor or furnish materials," etc. Formerly it was the rule that a party claiming to be paid for performing a contract should be required to show such performance before he was entitled to payment; and yet, in deciding upon the builder's contracts a different rule appears to have been gradually sanctioned by the courts, and, instead of forfeiting all payments until the work has been completed, the courts have been led by the hardship of individual cases, where there has been a compliance in important particulars, or where the facts will warrant the presumption that the work has been accepted

<sup>1</sup> [Ewing v. Fielder, 30 Ill. App. 202.]

<sup>2</sup> Kinney v. Sherman, 28 Ill. 520.

<sup>3</sup> Luter v. Cobb, 1 Coldw. (Tenn.) 525.

<sup>4</sup> Gaskill v. Davis, 53 Ga. 645.



by the owner, to allow recovery to the extent of work completed.<sup>1</sup> For example, where the contract is to pay as the work progressed, a mere delay of blinds for a period of two months would not prevent the parties from considering the contract completed.<sup>2</sup> But it necessarily follows from what has been said, that if there be a wilful abandonment of the work by a mechanic on a contract for its completion, without any default of the owner, there is no lien. As where a party contracted to build a house complete for the owner of a lot, but, after doing a small part of the work, abandoned it without any default of the owner, and the owner thereupon entered upon the premises, and completed the work, making use of the unfinished job of the contractor, the contractor on that account cannot recover for what he had done. It may be said that the owner ought not to avail himself of the benefit of what had been done upon the contract without paying what it was reasonably worth. But what was he to do? Abandon his building site entirely? The law does not require this. It is true, the court say, there are cases which establish the doctrine that when a party makes a special agreement to erect a building or build roads and bridges within a fixed time, and fails to do it in the manner and within the time agreed upon, yet if he act in good faith, and substantially executes the contract, the other party receiving the benefit of the work which is done, the law implies a promise by him to pay such sum therefor as the benefit which he receives is reasonably worth to him. But where there has been no execution of the contract in consequence of the contractor having abandoned it voluntarily before he had performed any considerable part, the case is different, and he has no lien.<sup>3</sup> So, in another case of abandonment or substantial non-performance of the contract, it was decided that the use or occupation of the building by the owner will not be deemed a waiver or such an acceptance of the building as will entitle the builder to sue upon the contract, leaving the owner to deduct his damages from the contract price.<sup>4</sup> The completion of a contract by the assignee of an insolvent contractor under direction of the court is, in substance, a new contract, and there is no mutuality between the contractor's demand against the assignor and the assignee's demand against the contractor. The defendant contractor shortly before the assignment, purchased a claim against it as a set-off, of which he notified the

<sup>1</sup> *Lutz v. Ey*, 3 Abb. Pr. (N. Y.) 475.

<sup>2</sup> *Thompson v. Yates*, 28 How. Pr. (N. Y.) 142.

<sup>3</sup> *Malbon v. Birney*, 11 Wis. 107.

<sup>4</sup> *Smith v. Coe*, 2 Hilt. (N. Y.) 365.

corporation, and after the assignment he demanded of the assignee the fulfilment of the contract, without notifying him of the claim against the assignor. Held, that this set-off was properly allowed against the account of the assignor, and disallowed as to the account of the assignee.<sup>1</sup> If the contractor A. abandons the contract, and S., a surety on A.'s bond, completes the building under the direction of the owner, and as his agent, the terms of the original contract will not control materials and work furnished and done for S.<sup>2</sup>

§ 138. **No Loss of Lien when occasioned by Default of Owner.**—It is, however, universally true that no loss of lien is occasioned for the work actually performed in accordance with the contract when the work has been stopped or abandoned in consequence of the default of the owner.<sup>3</sup> Accordingly a mechanic who does not complete fully his contract, in consequence of the failure of the owner to comply with the terms of the contract, will nevertheless be entitled to a lien for his labor performed.<sup>4</sup> So, it is no objection to the maintenance of a petition to enforce a lien that the petitioner never completed the work, and that, in the condition in which it was left by the petitioner when he ceased to work, that which was performed was of no value to the owner for the purpose for which it was designed, if the reason why the petitioners so ceased to work was that the owner failed to furnish materials therefor according to his agreement.<sup>5</sup> So where a party contracted with another to do the carpenter work on a brick building then in the course of erection, to be paid for as his work progressed, on estimates to be furnished by the architect of the building, and a brick wall was blown down after an estimate had been made and before the contract was completed, and he was unable to proceed by reason thereof, and the owner of the building refused to pay the amount of the estimate according to the contract, the contractor was justified in abandoning the contract and was entitled to enforce a mechanics' lien for the work done.<sup>6</sup> As to whether a mechanic is authorized to abandon the work in consequence of non-payment of instalments during its progress, must depend largely upon the terms of the contract itself. The decisions are not altogether harmonious. Thus it is said that the mere fact that money is

<sup>1</sup> [Gibson v. Nagel, 15 Mo. App. 597.]

<sup>2</sup> [Green v. Clifford, 94 Cal. 49.]

<sup>3</sup> Cited with approbation in *Merchants' & Mechanics' Savings Bank v. Dashiell*, 25 Gratt (Va.) 625.

<sup>4</sup> *Smith v. Norris*, 120 Mass. 58;

[*Charnley v. Honig*, 74 Wis. 163; *Hawes v. Reliance Wire Works Co.*, 46 Minn. 44; citing *Phil. § 138*. See *§ 147*.]

<sup>5</sup> *Bushfield v. Wheeler*, 14 Allen (Mass.), 139.

<sup>6</sup> *Schwartz v. Saunders*, 46 Ill. 18.

to be paid as fast as the work progressed on the demand of the contractor does not authorize its abandonment on a failure of the owner so to do, unless the payments are made a condition precedent to the performance of the work by the express and positive provisions of the contract.<sup>1</sup> The same court on another occasion said they found no case where the failure to pay the consideration for the work as it progressed, according to the terms of the agreement, had been held such an act or omission on the part of the defendant as to justify the other party in not completing the contract.<sup>2</sup> Failure of the owner to pay instalments when due is not such an act as prevents fulfilment of the contract. If the contractor abandons work for such cause he forfeits his lien, unless the payments are expressly made conditions precedent to the performance of the work.<sup>3</sup> Again, where there was an entire contract not divisible as to the time of payment, without any specification as to the time of payment, excepting the labor was to be done by day's work, the law in such case requires the whole work to be done before the contractor can call for his payment. A mere voluntary payment on account does not alter the rights of the parties. Performance of the entire contract in such cases is a condition precedent to payment. If the contractor wanted any other terms of payment, he should have stipulated for them in his contract.<sup>4</sup> The owner's assignees or vendees, purchasing expressly subject to such lien claims, stand in his shoes, and if they refuse to permit the contractor to complete the work, he will be entitled to a lien to the extent of the loss sustained.<sup>5</sup>

§ 139. **Measure of Damages when Default is occasioned by Owner.** — The measure of damages in the event of an abandonment in consequence of the act of the owner, according to the later cases, is not the whole price agreed to be paid, but the actual loss sustained, which will consist of the value of the service rendered and the damage sustained by the refusal to allow performance of the rest of the contract.<sup>6</sup> Thus in one case, where an action was brought under the provisions of a law "when the owner of the land shall have failed to perform his part of the contract, and by reason thereof the other party shall without his own default have been prevented from performing

<sup>1</sup> *Kinney v. Sherman*, 28 Ill. 520.

<sup>2</sup> *Palm v. O. & M. R. R.*, 18 Ill. 220; *Christian County v. Overholt*, Id. 223.

<sup>3</sup> [*Geary v. Bangs*, 33 Ill. App. 582.]

<sup>4</sup> *Cunningham v. Jones*, 3 E. D. Smith, (N. Y.), 650; s. c. 4 Abb. Pr. 433.

<sup>5</sup> [*Hawes v. Reliance Wire Works Co.*, 46 Minn. 44; citing Phil. § 147. See § 138.]

<sup>6</sup> *Cutter v. Powell*, 2 Smith Lead. Cas., Hare & Wallace's notes, 44.

his part, he shall be entitled to a reasonable compensation for as much thereof as he has performed in proportion to the price stipulated for the whole, and the court shall adjust his claim accordingly," it was held error in the court to instruct the jury that the value of the part a party did perform could be ascertained by the cost of completing the remainder of the building; nor could the mechanic recover damages in consequence of the failure of the owner to comply with his part of the contract.<sup>1</sup> So where a statute gave "to all persons performing labor or furnishing materials for the construction of any building, a lien on the building constructed, to the extent of the labor done or the materials furnished," and parties who were performing work to whom a payment under the contract was due by the owners and unpaid, notified the owners that they considered the contract annulled in consequence of the non-payment, but added that, to enable the owners to make other arrangements, they would voluntarily continue the work for six days longer, for which they would ask no pay except what the owners might choose to give from their sense of honor. At the end of the six days' labor, receiving no reply from the owners, they withdrew their previous note, except that part of it declaring the contract annulled. On this showing they were justified in abandoning the contract when they did, and were entitled to a fair compensation for the work performed.<sup>2</sup> But in another case, where the statute was that the building "shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same," a party designated an architect, under employment by the owner of a building, and who devoted his time in making plans and drawings of the work to be done and in directing and overseeing its execution in accordance therewith, was considered entitled to recover the full amount of his contract, although the work was stopped by his employers before it was entirely completed.<sup>3</sup> It is the duty of one erecting a building to keep the work progressing so that contractors can complete their contracts in the agreed times. Damages may be recovered for delay caused by failure to do this, and the allowance of extra time in such case by the terms of the contract will not preclude such recovery.<sup>4</sup>

§ 140. **When by Default of Mechanic.**—If the default, either in the workmanship or other agreements of the contract, is on

<sup>1</sup> Hale v. Johnson, 6 Kan. 137.

<sup>2</sup> Canal Co. v. Gordon, 6 Wall. 561.

<sup>3</sup> Bank of Penn. v. Gries, 35 Penn. 423.

<sup>4</sup> [Nelson v. Pickwick Associated Co., 30 Ill. App. 333.]

the part of the contractor, all the authorities agree that the owner shall be indemnified to the extent of the loss sustained; and this defence may be made in the proceedings to enforce the lien, either by giving the same in evidence in mitigation of damages, or by recoupment. Thus where, by the contract for building a house, the builder was to furnish the materials and to build the house in a workmanlike manner, and the price to be fixed by referees chosen by the parties; and soon after the work was finished it was valued and the price fixed; but afterwards defects became apparent by the shrinking of the timber, showing that the work was executed in a very defective and unworkmanlike manner, it was held that the valuation did not conclude the owner of the house, but he was entitled to compensation for the defects; and, in a suit to enforce the lien for the price of building the house, the owner was required to pay only what the building was worth.<sup>1</sup> Again, unliquidated damages, arising from deficiency in the performance of a contract for the erection of a building, may be given in evidence as set-off against the plaintiff's claim for a mechanics' lien, under a statute which authorizes a *scire facias*, and "a rule upon the defendant to appear and plead thereto, as in other actions," but they will not authorize the jury to find a balance in favor of the defendant, unless provided for by special statute.<sup>2</sup> Under the same law, it was again held that the lien may be reduced, by showing defectiveness in the work, and the like.<sup>3</sup> When damages for delay in performing a contract have been once waived, they cannot be set off in enforcing a lien.<sup>4</sup> In a bankrupt proceeding against the owner, whose building was stopped in consequence of his bankruptcy, the amount required to finish the contract, it was decided, should be deducted from the stipulated price.<sup>5</sup> The rule adopted in Louisiana is substantially the same; as where one who has contracted to erect a building, after having performed part of the work, becomes unable to fulfil his contract, the proprietor, on his default, may proceed to complete the building; and if the amount expended in its completion, and the damages to which the proprietor may be legally entitled in consequence of the default, do not equal the unpaid instalment stipulated for the work, the contractor will have, to the extent of the residue, a claim, *ex æquo et bono*, for his unpaid work,

<sup>1</sup> *Iaeger v. Bossieux*, 15 Gratt. 83.

<sup>4</sup> *Nat. Stock Yards v. O'Reilly*, 85 Ill.

<sup>2</sup> *Bayne v. Gaylord*, 3 Watts (Penn.), 546.

301.

<sup>5</sup> *In re Cook v. Gleason*, 3 Chic. Leg.

<sup>3</sup> *McQuaide v. Stewart*, 48 Penn. St. N. 410.

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and, in the absence of evidence to the contrary, it will be presumed that the proprietor has been benefited to that extent.<sup>1</sup>

*Second: As between sub-contractor or material-man and the owner.*

§ 141. **Statement of General Principles as to Measure of Damages.** — The right of the sub-contractor or material-man to establish a lien against the building, or to make claim for what sum may be in the hands of the owner, where he has himself made default in the complete performance of his contract or in the case when he has performed his part of the contract existing between himself and his contractor, but where the principal contractor has made default in his agreement with the owner, depends largely upon the provisions of the particular statute under investigation. In those States where the contractor has been regarded as simply the agent of the owner, authorized to make the necessary contracts on his behalf for the performance of the work agreed upon, the cases heretofore mentioned between contractor and owner would be authority under similar circumstances. In others, where the sub-contractor is secured a lien, notwithstanding no privity exists between himself and the owner, and he fails to meet the requirements of his contract, he cannot enforce a lien to any greater extent than the value of the work or materials furnished, and would be responsible to his immediate employer for his default according to the ordinary measure of damages on contracts. In all those States where no privity exists between the sub-contractor or material-man and the owner, and for the payment of the debts due them, and either a lien is given to the extent of the original contract price, or a right to appropriate the funds in the hands of the owner which are due to the contractor, the claims of the sub-contractor or material-man are in strict subordination to the right of the contractor to recover against the owner; and, if the contractor has made default, it affects *pro tanto* their recovery against the owner. The following review of the authorities will show the extent to which this subject has been adjudicated.

§ 142. **When Sub-contractor may recover in full, notwithstanding Default of Contractor.** — Under a statute which provided that "every building shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same," in a case where

<sup>1</sup> *Allen v. Wills*, 4 La. An. (1849) 97.

a party made a contract with a mechanic to put up a furnace with hot-air tubes, with a proviso that, if the plan did not succeed, the mechanic should receive nothing for his materials and labor. The plaintiff, a sub-contractor, furnished the tubes and put them in their places. The whole plan proved abortive and the tubes were removed. Under these circumstances, the contractor being entitled to no compensation, the question arises, Does the sub-contractor who claims through him stand in a better position, and has he a paramount right to that of the person who employed him, which is incapable of being affected by his default or failure? At common law this question could have but one answer. He would have had no claim against the owner; he must have looked solely to his immediate superior. But the intervention of this mechanics' lien act has abrogated these ancient principles, and introduced an entirely new set of relations between the doers of work and those for whose benefit it is done; contractors have acquired the power of agents, so far as regards the building for which they contract; and the burden of their default or breach of obligation has been thrown, in great measure, on those who employ them, in exoneration of those whom they employ. Hence the question in a *scire facias* on a mechanics' lien has become, not whether the contractor could recover against the owner, but whether the sub-contractor is entitled to recover against the contractor; for, if so, no defence merely between the contractor and owner can be set up as a defence by the owner. This construction of the law may be said to be at variance with justice, but has been adopted from necessity, for otherwise, a skilful draftsman might easily defeat the object the legislature had in view.<sup>1</sup> Where by a building contract, the employer is to pay in instalments as specified portions of the work are completed, and the contractor so far progresses with the work as to entitle him to some of the instalments, a material-man who has furnished materials for the work so done, and otherwise complies with the provisions of the act, is entitled to a lien, notwithstanding the fact that the contractors afterwards fails to complete the building and abandons the contract.<sup>2</sup> The contractor's failure and inability to complete the work, and its completion by the owner, do not affect the sub-contractor's claim.<sup>3</sup>

§ 143. **When Sub-contractor must show Performance on Part of Contractor.** — But where the statute, in giving the sub-contractor

<sup>1</sup> *Rand v. Leeds*, 2 Phila. 160.

<sup>2</sup> [*Railroad v. Miller*, 80 Va. 821, 831,

<sup>3</sup> [*Whittier, Fuller & Co. v. Blakely* 832.]  
*et al.*, 13 Oreg. 546.]

a right to the funds in the hands of the owner, which are due to the contractor, requires the work to be done, "in conformity with the terms of the contract with the owner," and it appeared that the work and materials for which the sub-contractors claimed did not conform to the original contract, that the deviations therefrom were not directed by the owners, and that the work, etc., had not been accepted by them, no judgment could be rendered against the owners. Under such an act, the work or materials done or furnished must be in conformity with the contract, unless accepted and objection waived. These are essential prerequisites; and it would be unjust to a defendant owner to dispense with them, and to hold him responsible to the mechanic or material-man, if the work done or materials furnished are not, and neither of them is, in conformity with the contract, and nothing therefore due to the contractor. It is true this would seem to impose upon the persons named the duty of ascertaining that the materials or work were in conformity with the contract; but the law must make their liens thus acquired by legislative enactments subservient to the owner's right, between whom and them there is no privity of contract, and to whom they must be strangers.<sup>1</sup> Again, under the same statute, it was held that a lien in favor of the sub-contractor against the owner exists only when the work performed is contemplated by the contract between the owner and the first contractor.<sup>2</sup> Accordingly, where the proof was that the contractor had constructed a certain building for an owner of a lot, and that the claimant furnished the contractor materials for the same, the claimant should have further shown a contract existed between the owner and contractor, and that the work had been so far performed thereunder as was *prima facie* sufficient to entitle the contractor to recover, had he brought his action for the same cause.<sup>3</sup> So, under a similar law, the lien of sub-contractors and material-men must be determined and controlled by the terms of the original contract between the owner of the property and the original contractor. Of the existence of such original contract and its terms, such lien-holders are presumed to have notice, and to have taken sub-contracts in strict subordination to its terms.<sup>4</sup> Again, where the original contractor has failed to complete his contract, the owner will only be liable to sub-contractors for so much as the work and materials shall be shown to be reasonably

<sup>1</sup> Grogan v. The Mayor, 2 E. D. Smith (N. Y.), 722; Pendleburg v. Meade, Id. (N. Y.), 693.

<sup>2</sup> Broderick v. Boyle, 1 Abb. Pr. 319.

<sup>4</sup> Shaver v. Murdock, 36 Cal. 293.

<sup>3</sup> Dixon v. La Farge, 1 E. D. Smith,



worth according to the original contract price, first deducting so much as shall have been rightfully paid under the contract, and damages, if any, sustained by the owner, growing out of the non-fulfilment of the contract, as the owner is entitled to the benefit of his contract.<sup>1</sup> Where there is nothing due under the contract when the lien is filed, and the contractor abandons the building, it being completed by the owner, the question of recovery by the sub-contractor in his lien suit, depends upon the question whether the owner completed the building under and in continuation of the contract, or rescinded the contract and completed the building outside of its provisions. If the contract provides that in case of abandonment by the contractor the owner may complete the building, and deduct the expense from the contract price, the lienor may recover to the extent of the balance thus left.<sup>2</sup> But if the contract is silent on this matter, or the owner does not choose to finish under the said provision when there is one, the sub-contractor will have no lien, because he must always show performance, and the right of the contractor to recover, as a condition precedent to his own recovery.<sup>3</sup> Where the contractor B. abandoned his work, and his sureties completed it under a new contract by which they were to receive what was due B. at the time of abandonment, a sub-contractor under B. had no lien, even on what B. had earned, for by his abandonment he forfeited his claim to it.<sup>4</sup>

§ 144. **When no Special Contract exists.** — When no special contract has been entered into between the contractor and owner, with no plans or specifications settled upon, but simply a general employment; or when, from the commencement of the work to its completion, the contract had been by mutual consent so substantially and materially departed from that it was impossible, from the evidence at the trial, to ascertain the extent of the alterations in the contract which was originally intended to control in the erection of the building, — in such a case, under a statute which provided that “any person who shall by virtue of any contract with the owner thereof, or his agent, or any person who, in pursuance of an agreement with any such contractor, shall, in conformity with the terms of such contract, perform any labor, . . . shall have a lien for the value of such labor and materials,” etc.; and “any person performing such labor . . . without a written contract with such owner or his agent, shall

<sup>1</sup> *Mehrle v. Dunne*, 75 Ill. 239.

<sup>2</sup> [*Van Clief v. Van Vechten*, 130 N. Y. 571, 580.]

<sup>3</sup> [*Hollister v. Mott*, 132 N. Y. 18, 21.]

<sup>4</sup> [*Weismair v. Buffalo*, 57 Hun, 48.]

produce the best evidence to establish the value of such labor or materials," etc., parties furnishing labor or materials may acquire a lien for the value of such labor or materials, under an implied obligation on the part of the owner to pay what they were reasonably worth.<sup>1</sup>

§ 145. **Sufficient, if Sub-contractor shows Substantial Compliance with Original Contract.** — The right of a sub-contractor to recover under the law quoted in the preceding section, which also further provided, "that such owner shall not be obliged to pay for, or on account of, such house, etc., in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract," depends upon the question whether the contractor had a claim which he could have enforced against the owner. There are cases where a substantial compliance has been held sufficient to take the case out of the rule; but it cannot be extended to embrace the case of a wilful dereliction of the contract when partly executed by one of the parties, without the assent and against the will of the other. It is not law that a party contracting to perform a specific job may prosecute it so far as he thinks proper, and then abandon it unfinished without the fault or assent of the party with whom he contracts, and then sue and recover for so much labor as he has chosen to devote to the undertaking.<sup>2</sup> A workman who undertakes to perform an entire contract cannot quit when he chooses, without cause, and enforce a lien for such portion of the work as he may have performed. Nor can he enforce a lien for each week's wages. He has no power to split up an entire demand, and maintain several suits, and enforce several liens.<sup>3</sup> The same proposition is expressed in the following cases: Where a contractor agreed by written contract with the owner of land for the performance of labor towards the erection of a building thereon, and the contract was not performed in consequence of the abandonment of the work by the contractor, who so far wholly failed to perform his agreement that no money ever became due from the owner, according to the terms of the contract, which were that "no payments to be made until work is completed, except what should be considered necessary by both parties," the owner is not liable, and laborers and sub-contractors

<sup>1</sup> *Smith v. Coe*, 2 Hilt. (N. Y.) 365.

<sup>3</sup> *Thomas v. Industrial University*, 71

<sup>2</sup> *Cunningham v. Jones*, 3 E. D. Smith Ill. 312.  
(N. Y.), 650; *Smith v. Coe*, 2 Hilt. (N. Y.) 365.

employed by the contractor could not, by filing notices, acquire liens upon the building or land, and compel the owner to pay them for the work and labor actually performed by them.<sup>1</sup> So where a contractor has thrown up his contract, and there was nothing due to him thereunder, either at the time of filing of a notice of lien or subsequently, the claimant, as sub-contractor, or material-man, can take nothing by his lien, notwithstanding the owner is compelled to employ some one else to go on and finish the building, and payment thereafter became due to such third person.<sup>2</sup> So where the owners offered to show that they paid a sum of money on the contract before the lien was filed, and that after the contractor received this payment, being more than was due by the terms of the contract, he abandoned it, the evidence would have been a complete defence to the sub-contractor's claim, and should not have been excluded on the trial.<sup>3</sup> Again, where the contractor abandons or refuses to complete the work, having received payment of all the instalments to which he was entitled, and the owner, by authority of an express provision in the contract, completes the building at an expense exceeding the contract price, a claimant cannot maintain an action under the above law, upon a notice filed subsequently to the last payment received by the contractor.<sup>4</sup> And the owner in such case may prove on the trial what it had actually cost him to complete the building, for the purpose of showing that nothing was due to the contractor, and consequently to the sub-contractor.<sup>5</sup> In other words, the lien creditor, by filing his notice of lien succeeds only to the rights and claims which at the time are possessed by the original contractor, and to no other or greater extent. Consequently, unless a state of facts is shown which in a proper action would entitle the original contractor to recover from the owner, the lien creditor cannot recover.<sup>6</sup> In an action by a lienor who claims a sum due under the contract he is under the same obligation to prove performance, and to the same extent as would the contractor in an action by him. Where, therefore, the lienor, in an action to foreclose his lien, claims an instalment due, and it appears that the contractor abandoned and wilfully refused to perform the contract after due notice, the lienor must show performance of its stipu-

<sup>1</sup> *Linn v. O'Hara*, 2 E. D. Smith (N. Y.), 560.

<sup>2</sup> *Allen v. Carman*, 1 E. D. Smith (N. Y.), 692.

<sup>3</sup> *Spalding v. King*, 1 E. D. Smith, 717.

<sup>4</sup> *Ferguson v. Burk*, 4 E. D. Smith, 760.

<sup>5</sup> *Smith v. Ferris*, 1 Daly (N. Y.), 18.

<sup>6</sup> *Smith v. Coe*, 2 Hilt. (N. Y.) 365.

lations entitling the contractor to the payment, without any omission, so substantial in its character as to call for an allowance of damages if he had acted in good faith.<sup>1</sup> In another State, under a lien law which limited the owner's liability "to the amount due the contractor," a sub-contractor, who had furnished lumber to the contractor, which the latter had used in the construction of a building he subsequently voluntarily abandoned, cannot recover against the owner.<sup>2</sup>

§ 146. **Rule of Compensation when Damages are liquidated.** — The rule of compensation in cases of abandonment may be regulated by the terms of the contract, and thus prevent, if stipulated, a total loss of compensation for work performed. Thus a contract contained a provision that if for any cause the contractor was prevented from finishing the building, the owner, on fifteen days' notice, might employ another person, and pay the latter out of any money due the contractor; by fair interpretation the owner was to deduct whatever was required to finish the contract out of the moneys remaining unpaid on the contract, and that, by failing to complete, the contractor forfeited only so much as the owner might be obliged to pay to other persons to finish the buildings.<sup>3</sup> So, where an agreement provided that a sum was to be deducted for any particular omission or failure in its performance by the contractor, an owner cannot, in a suit by a sub-contractor to enforce his lien, claim any other or greater deduction in consequence of the omissions to perform the contract, for the purpose of discharging himself from liability to the contractor, and thus from the lien of the sub-contractor. As where the agreement specifies that if, during the progress of the work, the contractor fail to supply a sufficiency of workmen or materials, the owner may provide them after three days' notice, and deduct the expense from the contract price. The owner, if he elect to exercise this power, and under it finishes the building, cannot afterwards claim any greater deduction or allowance from the contractor than the amount expended in completing the contract. Doubtless, under such an agreement, he might have disregarded the power thus conferred, and have rested upon his right to have the work performed at the time agreed upon, but he did not adopt that course, and, having acted upon the contract, must abide by the consequences. The owner by so doing, became the contractor *pro hac vice*. But at all

<sup>1</sup> [Van Clief v. Van Vechten, 130 N. Y. 571.]

<sup>3</sup> Foley v. Gough, 4 E. D. Smith (N. Y.), 724.

<sup>2</sup> Malbon v. Birney, 11 Wis. 107.

events, if the contract had been silent upon the subject, there would have been no difficulty in relieving the owner from any of his alleged grievances; because, the contractor having failed to perform his contract, and the claimant being entitled only to what might be due him, the latter could not recover.<sup>1</sup> So under a contract for work which was to be completed by a time certain, with a provision that for default the owner should have damages at the rate of ten dollars per day until the work was completed, the owner is entitled, as against a sub-contractor, to retain such sum.<sup>2</sup> So, in a suit brought to declare a mechanics' lien, it is proper to allow the damage defendant sustained by reason of the failure of the plaintiff to complete the building within the time specified in the contract, and also for the unworkmanlike manner in which the work was done.<sup>3</sup> Again, where by the terms of a contract a certain amount is due to the contractors, sub-contractors and material-men are entitled to be paid out of that amount, on service of their attested accounts, although the contractors fail afterwards to comply strictly with their agreement. The proper test in such a case is, Have the contractors complied with the stipulations up to the time of the falling due of the instalments for which the sub-contractors and material-men have served their attested accounts?<sup>4</sup> So in another case where there was no abandonment, but the contractor simply failed to complete the building within the time specified in the contract, the owner, after putting him in default, proceeded to finish the building; the money remaining in his hands, after paying for the completion, is a fund out of which the privileged claims of material-men were ordered to be paid.<sup>5</sup>

§ 147. **Waiver of Default in Performance.**—The failure to complete the work according to contract will be excused, if it occurred either through the fault or by consent of the employer. Thus, where a contractor by his own act is proved to have prevented the completion of a contract, a lien may be acquired and enforced for the value of labor or materials performed or furnished in pursuance thereof, to the time of such prevention, if the owner is indebted in such sum to the contractor.<sup>6</sup> The fact that work, for which a lien is claimed, was not performed within the period prescribed by the written contract, will not bar the

<sup>1</sup> *Gillen v. Hubbard*, 2 Hilt. (N. Y.) 303.

<sup>2</sup> *O'Donnell v. Rosenberg*, 14 Abb. Pr. (N. s.) 59.

<sup>3</sup> *Burn v. Whittlesey*, 2 MacArthur (D. C.), 189.

<sup>4</sup> *St. Paul's Church v. Giraud*, 15 La. An. 124.

<sup>5</sup> *Jorda v. Gobet*, 5 La. An. (1850) 431.

<sup>6</sup> *Dennistoun v. McAllister*, 4 E. D. Smith (N. Y.), 729.

claimant from the benefits of his lien, where the delay was caused or consented to by the owner.<sup>1</sup> It is entirely competent for an owner to waive a strict compliance with the terms of the contract on the part of the contractor, as to when the building should be completed.<sup>2</sup> If the owner allows the builder to proceed with the work after the time fixed for completion, and on completion accepts the work and makes payments and gives notes for the balance, the agreed time of completion is waived.<sup>3</sup> Delay resulting from a change in some part of the building from the original plan, at the instance of the owner, will not work a forfeiture of the lien.<sup>4</sup> Where there has been a substantial performance of contract, and whatever failure there may have been is waived by the owner, and the work accepted, this is such a performance as will authorize the lien.<sup>5</sup> Although work done on a building by a sub-contractor may not be exactly according to the plans and specifications referred to in the original contract, yet if it, as a whole, is done to the satisfaction of the owner of the property, except in a few minor matters, which the sub-contractor offers to correct, and is prevented from so doing by the owner, and the cost of such correction is trifling, the sub-contractor may enforce his lien, and defects not arising from the execution of the work, but from the architecture, will not defeat the lien.<sup>6</sup> After the building has been accepted and used without complaint, slight defects relied upon as an excuse for not paying are to be scrutinized, and any failure to call on the contractors to remedy or repair alleged defects may be considered by the jury.<sup>7</sup> It is no defence to a petition for the enforcement of the mechanics' lien, by one employed by a contractor to aid in the erection of a house upon the land of another, to prove that, before the labor was performed, the time had expired within which the contractor, by his written agreement, was to finish the same, if such time had been enlarged by a parol agreement or otherwise.<sup>8</sup> So, under a contract to build a house by a fixed date, suffering the contractor to proceed after the day fixed for its completion, and the acceptance of the work at a future day amounts to a waiver of performance at the time specified in the contract. But the mere extension of time does not affect the other stipulations of the agreement.<sup>9</sup> So where work is to be

<sup>1</sup> *Foley v. Gough*, Id. 724.

<sup>2</sup> *Heckmann v. Pinkney*, 81 N. Y. 211.

<sup>3</sup> [*Padlock v. Stout*, 121 Ill. 571.]

<sup>4</sup> *Montandon v. Deas*, 14 Ala. 33.

<sup>5</sup> *Havighorst v. Lindberg*, 67 Ill. 463 ;  
*Fish v. Stubbins*, 65 Ill. 492.

<sup>6</sup> *Welch v. Sherer*, 93 Ill. 64. Cases of

*Fish v. Stubbins*, 65 Ill. 492, and *Powell v. Webber*, 79 Ill. 134, overruled by *Clark v. Manning*, 90 Ill. 380.

<sup>7</sup> *Porter v. Wilder*, 62 Ga. 520.

<sup>8</sup> *Rockwood v. Wolcott*, 3 Allen (Mass.), 458.

<sup>9</sup> *Nibbe v. Brauhn*, 24 Ill. 268.

completed by a specified time, as to which there is a failure, if the party in whose favor the default occurs authorizes a sub-contractor to go on and finish his part of the work, it amounts to a ratification, and estops him from denying that the completion of his work was done under, and in pursuance of, the original contract.<sup>1</sup> Although the effect of the failure of a contractor, and an assignment by him of the contract for the benefit of his creditors, may prevent a sub-contractor from completing the whole of his contract with the contractor, yet, inasmuch as the assignee of the contractor takes the contract *cum onere*, when the assignment is made with the consent of the owner, who detained from the contract price the amount of the claim, the sub-contractor acquires a lien for the value of his labor and materials performed and furnished up to the time when he is prevented.<sup>2</sup>

§ 148. **Materials: General Statement of the Law.**—The phraseology of almost all the mechanics' lien laws guarantees the lien for "work done and materials furnished." The important inquiry therefore arises, When are the words of the statute satisfied, when are materials furnished? Is it essential that the identical materials should become actually incorporated as a part of the structure, or are they protected by the lien when they are delivered by the material-man in the ordinary course of trade to the contractor, under circumstances which show it was the understanding at their sale, that they were to be used in the erection of a particular building, notwithstanding their subsequent misappropriation? Courts have decided differently, although interpreting almost identical phraseology. It has been held by some that the words of the law are fulfilled whenever the material-man has in good faith furnished the materials for the purposes of building, irrespective of their subsequent fate, and urged, in support, the unreasonableness and impossibility of requiring the material-man to devote his time to see to their application to the structure, particularly when the owner has, in employing a contractor himself, given credit to the individual who usually makes the default. As between the owner and material-man, the argument is strong. Other courts, when viewing the question as to lien claimants *inter se*, have considered that the equity of the lien is the incorporation of the materials of the merchant into the building, and that they possess a kind of interest therein, and right of payment out of the specific articles, notwithstanding their having been attached to

<sup>1</sup> Jarden v. Pumphrey, 36 Md. 361.

<sup>2</sup> Henderson v. Sturgis, 1 Daly (N. Y.), 336.

the soil of another; and therefore giving a lien to others whose property never entered into the improvements, through accident or fraud, would, where a sale is insufficient to pay all, be appropriating, contrary to this equity which prompted the law, the property of some to the debts of others. The authorities and reasoning of the courts are given in full below.

§ 149. **Materials furnished, though not incorporated in Building, will support Lien.**<sup>1</sup>—It was held, where a lien law provided that "every dwelling-house shall be subject to the payment of the debts contracted for, or by reason of, any materials found or provided by any lumber-merchant . . . for or in the erecting and constructing such house," etc., if a debt be contracted for and on the credit of the building, and the lumber be delivered with an understanding of the parties that it is to be used in the erection thereof, a lien will be created; although the article was subsequently sold to other persons, and not used in the building.<sup>2</sup> Under the same law, where lumber and window-sash were furnished to a contractor, to be used in the erection of a building, the lumber having been delivered on the ground on which the building was being erected, and the sash taken from the possession of the material-man, by the contractor, to a shop to be painted, and both lumber and sash were subsequently sold on an execution against the contractor, and not used in the building, it was held, nevertheless, the requirements of the statute were complied with, and the building was subject to a lien for their payment, and that they were not the property of the contractor, or liable to sale on execution against him. The principle of these decisions was that, as soon as owners of lots ceased to be their own builders, they put it in the power of the person employed by them to occasion losses to mechanics and material-men which they ought not to bear; and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor; the principle being held to be not only a just, but convenient one. Whether the builder be the agent of the owner or an independent contractor, his appointment to the work creates a confidence in him which was not had before; and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning it. Nor does the rule bear hard on the owner.

<sup>1</sup> See § 159.

<sup>2</sup> Wallace v. Melchoir, 2 Browne, 104; Presbyterian Church v. Allison, 10 Penn.

413; Hinchman v. Graham, 2 Serg. & R. 170; Odd Fellows' Hall v. Masser, 24 Penn. 507; Singler v. Doerr, 62 Penn. 9.



He has it in his power to detain the price of the building while there are outstanding charges against it, or to stipulate for security against those that might afterwards turn up; and, if he use common prudence, any loss which occurs will eventually fall on the author of it. If he do not, he cannot charge the mechanic with the consequences of his own supineness.<sup>1</sup> So if materials have been supplied on the credit of a building in the course of construction, and could have been used, a mechanics' lien may be filed, though they never went into it at all,<sup>2</sup> but were used for the pavement, gutter, and out-house.<sup>3</sup> So, where "every mechanic or other person furnishing work or materials for buildings shall have a lien for the same," under this provision all the claimant is required to show is the fact that the materials were furnished for the purpose of being used in constructing the building; the court further stating it would be altogether unreasonable to require the material-man to follow the materials from his place of business to the building, and to make positive proof of the fact that they were actually used for the purposes for which they were alleged to have been purchased. Such a thing is not only a matter of extreme inconvenience in all cases, but in a majority of instances must be totally impracticable. This view, of course, excludes the idea of any fraud or collusion between the material-man and the contractor. The statements of the contractor are admissible in evidence to show the purposes for which the materials were purchased.<sup>4</sup> But in a later case under the same statute, it was held that a lien cannot be enforced against a building for materials furnished to the contractor, but not put into the building; and inasmuch as the contractor is not the agent of the owner, declarations by him, that materials purchased by him were used in a particular building, are not evidence against the owner.<sup>5</sup> That part of the material furnished was wasted, and did not actually go into the building is no defence, at least where the plaintiff's claim does not charge for the material so wasted.<sup>6</sup> Under similar language in the statute of another State, it was decided to be no objection to the validity of a claim for materials furnished for the erection of a building, that such materials were not actually used in the erection of any building. The right to the lien depends upon the fact that the debt was incurred and materials furnished for the

<sup>1</sup> *White v. Miller*, 18 Penn. 52.

<sup>2</sup> *Basch v. Sener*, 1 Pennypacker (Penn. Sup. Ct.), 22.

<sup>3</sup> *Hershey v. Gohn*, Id. 40.

<sup>4</sup> *Morrison v. Hancock*, 40 Mo. 561.

<sup>5</sup> *Deardorff v. Everhartt*, 74 Mo. 37; overruling *Morrison v. Hancock*, 40 Mo. 561.

<sup>6</sup> [*Schroeder v. Mueller*, 33 Mo. App. 28, 33.]

purpose of the building. In the absence of fraud on the part of the creditor, his rights are not affected by a failure to use the materials, or by their diversion from the purpose for which they were intended.<sup>1</sup> So the fair construction of a law "that any person who shall furnish materials for erecting or repairing any house or other building, by virtue of an agreement with the owner thereof, shall have a lien," is to extend the lien to all the material in good faith furnished for the purpose of erecting or repairing a house, in pursuance of an agreement with the owner, notwithstanding a part of the material may subsequently be otherwise appropriated, without the consent of the party furnishing it.<sup>2</sup> Where the lien "shall extend to all work done or materials furnished," if there be a *bona fide* sale and delivery of materials for a building to the actual contractor or builder, a lien may attach, whether the materials were used or not.<sup>3</sup> Where, however, the material is not in fact used in the building, the creditor must show that he sold it to be used.<sup>4</sup> Again, where it was provided "that every dwelling-house . . . constructed . . . shall be subject to the payment of all debts contracted for, or by reason of, any work done or materials found by any bricklayer . . . or other person employed in erecting or furnishing materials in the erection," etc., as between the material-man and the owner of the building, the former has a lien for materials sold to the latter with the understanding that they were to be used in erecting the building, although the latter made a different disposition of them, and procured materials for the building elsewhere. It was said, undoubtedly, questions of equity might arise between different material-men, where both had sold on the credit of the building, the materials of one having been used in its erection, and those of the other not, which might require the interposition of a court of equity.<sup>5</sup> When the contractor abandons the building, the material-man has a lien for all materials furnished on the contract, though a part of them have not been actually used in the building.<sup>6</sup>

§ 150. **When Materials are furnished.**<sup>7</sup> — The delivery referred to in the preceding section is always a question of fact, and depends upon the circumstances of each case. It is sufficient if the articles be delivered at or near the building, at the place

<sup>1</sup> *Morris County Bank v. Rockaway Man. Co.*, 1 McCart. Ch. 139.

<sup>2</sup> *Beckel v. Petticrew*, 6 Ohio St. 247.

<sup>3</sup> *Greenway v. Turner*, 4 Md. 296; *Watts v. Whittington*, 48 Md. 357; *Neilson v. Iowa Eastern R. Co.*, 51 Iowa, 184.

<sup>4</sup> *In re Cook & Gleason*, 3 Chic. Leg. N. 410.

<sup>5</sup> *Esslinger v. Huebner*, 22 Wis. 632.

<sup>6</sup> [*Hickey v. Collom*, 47 Minn. 565.]

<sup>7</sup> [See § 159.]

pointed out by the contracting party.<sup>1</sup> So, if lumber be *bona fide* furnished for a building, though delivered at a carpenter's shop at a distance from it, as there is no distinction between delivering materials at or near the building or at a distance from it, provided they be delivered in the usual course of business. The delivery at one place or another is no further important than as it furnishes evidence of the purpose for which the materials were sold. Where gross materials have to be worked up into articles suitable for the building, and which cannot conveniently be done on the premises, it would be useless to require the materials to be first delivered at or near the building, and then subsequently removed to a manufacturer's.<sup>2</sup> If work be done for, and on the credit of, the building, the place where it is done can make no difference. Steam and machinery have revolutionized the manner of building houses; and much of the work formerly done by hand, at or near the building, is now done at the mill.<sup>3</sup>

In like manner the good faith of the material-man is an important question of fact, to be determined upon all the circumstances of the case; and, as an evidence of it, the materials furnished ought to be of the kind that would induce a careful, prudent, and skilful man, acquainted with the building, to believe that they could be usefully employed in its erection. In such case the material-man is not bound to inquire into the character of the materials which the contractor had agreed with the owner of the building to use in its construction.<sup>4</sup> Where the materials furnished could not be used, because of a character totally unadapted for the building, no lien would arise.<sup>5</sup> A finding that G. had a contract with C., and that the plaintiff furnished G. with material without any finding that it was furnished to complete the contract, is insufficient to base a judgment of lien.<sup>6</sup>

§ 151. **When Materials must be incorporated to support Lien.**<sup>7</sup> — The decisions as intimated are not harmonious as to whether it is essential that the materials and labor must be actually incorporated in the work. Such conflict of authority presents an appropriate subject for legislative interference. Thus, on the other hand, where it was provided that "any person who shall,

<sup>1</sup> Wallace v. Melchoir, 2 Browne, 104.

<sup>2</sup> Hinchman v. Graham, 2 Serg. & R. 170.

<sup>3</sup> Singerly v. Doerr, 62 Penn. 9; Wilson v. Sleeper, 131 Mass. 177.

<sup>4</sup> Odd Fellows' Hall v. Masser, 24 Penn. 507.

<sup>5</sup> Odd Fellows' Hall v. Masser, 24 Penn. 507.

<sup>6</sup> [Goodrich v. Gillies, 62 Hun, 479, 482-483.]

<sup>7</sup> [See § 159.]

by contract with the owner of any piece of land, furnish labor or materials for erecting any building, shall have a lien upon the land for the amount due to him for such labor or materials, and the lien shall extend to all work done or materials furnished under the provisions of the contract," it was held that the legislature only intended to give this lien for the materials actually used in, or the labor really bestowed upon, the building situated upon the premises against which the lien is sought to be established. To allow a claim would give a lien, not for anything a party has done to enhance the value of the building, nor by reason of any encumbrance upon it, but because the owner of the premises had purchased lumber for the purpose of using it on the premises, but which he never did so use. The very essence of the lien created by this statute is the furnishing the materials of which the building is constructed. It continues, in the party furnishing the materials of which the building is erected, a *quasi* property in those materials and others with which it has been commingled in the building, and allows him to follow it, thus transformed, for the purpose of getting his pay. If the materials be furnished for the purpose of being put upon lot one, and they are placed in a building upon lot two, the lien is on the last lot where they were actually used, and not on the first. There is no lien on the premises till the material is put upon them. Any other construction would allow a lien if a man go to Chicago and buy lumber to build a house on a particular lot in Chillicothe, and *in transitu* the lumber is burned up. Such is not the intention or true construction of the law.<sup>1</sup> Again, in another case: The principle embraced in these statutes is founded in natural justice, that the party who has enhanced the value of the property by incorporating therein his labor or materials shall have security in the same, though changed in form and inseparable from the property. But justice does not require that he should be allowed the security in the same property for the price of materials which became no part thereof. To allow a lien for materials sold by one party to another under the representation that they would be wrought into a building, but which were not, may deprive others who provide materials which are actually used in construction in favor of a party who had sold materials for the building, but which have never been used in it. And the true construction of a statute which gives "any person who shall perform labor or furnish materials for, or on account of, any building, shall have a lien on the same," can extend no

<sup>1</sup> Hunter v. Blanchard, 18 Ill. 313.

further than to be security for the price of the labor and materials actually expended upon the property to which it attaches.<sup>1</sup> Reasoning upon the same principles, to give a lien for all the materials sold for the purpose of going into the building, irrespective of the actual use of them for that purpose, might have the effect of creating a lien to the full value of the building in favor of parties whose property did not in fact become part of the building; and thus the persons who had in fact erected or repaired the building would be deprived of any advantage from the liens given by a law providing that "every building, for the construction or repair of which any person shall have furnished materials or rendered services," shall be subject to a lien for the payment of the same.<sup>2</sup> Also under the California law, enacting that "All master-builders, mechanics, and all other persons performing labor or furnishing materials for the construction or repair of any wharf or building, shall have a lien," etc.; to enable a material-man to enforce a lien upon a building for materials furnished, it must be alleged and proved that they have been used in the construction of the building.<sup>3</sup> So, again, it has been held under a statute that secured the lien for "materials to be used in the construction," etc., it must not only be alleged and proved that the materials have been used in the construction of the building, but that they have been, by the express terms of the contract, furnished to be used in the building.<sup>4</sup> In Missouri, where "every person who shall do or perform any work upon or furnish any materials . . . for any building," etc., shall have a lien, a material-man is not entitled to a lien for lumber furnished to a sub-contractor to be used in the construction of a building, unless it was actually so used.<sup>5</sup> But while it may be undoubtedly true that, in order for a sub-contractor to sustain a lien against an owner, it must appear, not only that the materials were purchased to be used in the building, but also that they were in fact so used, yet when it is satisfactorily shown that the materials were sold to be used in the building, that they were delivered to the builder, and the building was actually built, and some were shown to have been actually used, and there is nothing to raise a suspicion that the materials, after delivery, were used elsewhere, or that an unnecessary amount were purchased, it was held that a finding of the trial court sus-

<sup>1</sup> Taggard v. Buckmore, 42 Me. 77; Perkins v. Pike, Id. 141.

<sup>2</sup> Chapin v. Persse, 30 Conn. 461.

<sup>3</sup> Houghton v. Blake, 5 Cal. 240.

<sup>4</sup> Holmes v. Richet, 56 Cal. 307.

<sup>5</sup> Schulenberg v. Prairie Home Ins., 65 Mo. 295; affirming Simmons v. Carrier, 60 Mo. 582, and Fitzpatrick v. Thomas, 61 Mo. 516.

taining the lien will not be disturbed although it was not affirmatively and specifically shown as to each article that it went into the building.<sup>1</sup> A diversion of a small unascertained portion of materials delivered for a specific purpose, on request, on the land of the defendant, will not prejudice the lien.<sup>2</sup>

§ 152. **Right of Property in Materials furnished.** — Closely connected with the subject discussed in the preceding sections is the inquiry, In whom does the right of property in materials furnished, prior to their incorporation in the building, vest? In those States where the contract of the material-man is completed on delivery, irrespective of their use, it is clear the right of property has passed from him. As to the right of property between owner and contractor, under those statutes where the materials are furnished on the credit of the building, it vests, on delivery, in the owner, and not in the contractor. The ownership, between the time of delivery and of working them into the building, cannot be in the contractor, because they are delivered to him, not on his own credit, but on the credit of the building, to which they are destined. They are sold for the building, and consequently to the owner of it. He has power to protect them from the contractor's creditors, and he cannot charge any inactivity in defence of his right thereto to the material-man, who has nothing to do with it. Even where collusion exists between the material-man and the contractor in furnishing too much, the excess does not belong to the contractor unless he pays for it.<sup>3</sup>

<sup>1</sup> Rice v. Hodge, 26 Kan. 164.

<sup>3</sup> White v. Miller, 18 Penn. 52.

<sup>2</sup> Chi. Art. Well Co. v. Corey, 60 Ill.  
77.

## CHAPTER XIV.

## WORK AND MATERIALS FOR WHICH LIEN IS GIVEN.

§ 153. **General Statement.**—The work and materials protected by the mechanics' lien are the subjects of statutory definition. The party claiming its protection must show affirmatively that he has performed such labor or furnished such materials as are described in the law authorizing the lien. The statutes of the several States are, however, for the most part identical in securing to the mechanic and others a lien for "all work done and materials furnished for or about the erection, construction, or repair of any building," etc. It will be observed that this phraseology contains several terms qualifying each other in an important manner. Thus this privilege is not accorded for all work done by mechanics, or materials furnished by merchants, nor for them, though used in erecting, constructing, or repairing certain objects to which they may be usefully devoted. The lien arises only when all three conditions are fulfilled; namely (first) the performance of work or supply of materials for or about (secondly) the erection, construction, or repair<sup>1</sup> of (thirdly) any building, etc. The Illinois law (1874) gives a lien for work or material furnished at the instance of the owner of any interest in the land, which becomes a part of the property and subject to said interest.<sup>2</sup> Some of the earlier lien laws were not so comprehensive as this provision, and many of the later ones are more extensive. For example, before this system had attained its present importance, the right of lien, in several jurisdictions, was confined exclusively to the mechanic for labor performed, and did not extend to materials; and in some it is considered still to be unsound policy to encumber property with a lien for repairs. On the other hand, the industries and necessities of other States have made it essential to extend the lien to work and materials furnished for machinery, mines, flumes, wharves, and bridges, as well as to buildings.

<sup>1</sup> *Croskey v. Corey*, 48 Ill. 442.

<sup>2</sup> [*Portoues v. Holmes*, 33 Ill. App. 312.]

*Work : —*

§ 154. **All Labor ordinarily employed in Erection of Buildings is protected.** — Wherever a lien is given to secure the payment "of work done" in the erection of a building, it includes all the labor which is ordinarily employed in the erection of the building contemplated by the contract.<sup>1</sup> The law makes no distinction between the values of the various kinds of work, but places those contributing artistic labor, used solely in ornamentation, upon the same basis as those who perform the more substantial parts. Accordingly, where every building is subject to a lien for the payment of "all debts contracted for work done . . . for or about the erection or construction of the same," paper-hangers are included, as well as other classes of mechanics. The work they perform is proper work in the construction of a house.<sup>2</sup> So, where the law secures all persons "furnishing labor . . . for erecting or repairing," a building, house-painters are within its protection. To an argument in opposition to them, that the painting of a house was merely its coloring, and not a part of its erection, which, it was said, consists in lifting its walls into the air, the court replied that, when the object of the law was considered, nothing could be plainer than that the legislature designed to cover all labor which the builder may choose to employ in finishing his house. If the builder protect the walls of his house from the action of the elements by covering them with a coat of paint or stucco, it is clearly work performed in the erection.<sup>3</sup> Again, it was held that when a lien is given for the "erection" of any house, the word contemplates and includes the entire construction of any house, and whatever is contributed either in labor or materials in the making or finishing of any part of it. Therefore painting, glazing, and varnishing a house would be protected by a lien under such a law.<sup>4</sup> Papering a house is a subject of mechanics' lien on the real estate.<sup>5</sup> Although under a law which enumerated "brick-makers, brick-layers, stone-cutters, masons, lime-merchants, carpenters, painters, and glaziers, blacksmiths, plasterers, and lumber merchants, and any other person employed in furnishing materials in the construction of such house," etc., it was held that paper-hangers had no lien.<sup>6</sup> The labor, of whatever character, however, must

<sup>1</sup> *Butler v. Rivers*, 4 R. I. 38.

<sup>5</sup> [*La Grill v. Mallard*, 90 Cal. 373

<sup>2</sup> *Freeman v. Gilpin*, 1 Phila. 23; s. c. 376.]

4 Penn. L. J. 411.

<sup>6</sup> *Freeman v. Gilpin*, 4 Penn. L. J.

<sup>3</sup> *Martine v. Nelson*, 51 Ill. 422.

411.

<sup>4</sup> *France v. Woolston*, 4 Houst. (Del.)



be performed. The lien does not attach for labor thereafter to be done, nor for materials thereafter expected or agreed to be applied. There is no lien for labor or materials which may never be performed or become a part of the building.<sup>1</sup> If a statute give a lien for thirty days' labor they need not be consecutive days.<sup>2</sup> Excavating and constructing a foundation are easily recognized as the commencement of a building, and there is a lien for such work, although the owner fails to carry on and complete the work.<sup>3</sup> A lien attaches for putting up gas fixtures.<sup>4</sup> The Massachusetts law allows a claim of lien for labor alone "if it can be distinctly shown what the labor was worth," and the lien will cover the worth limited only by the amount of the contract debt unpaid.<sup>5</sup>

§ 155. **Incidental Labor.** — From the complicated character of every building, there is necessarily a large amount of incidental and other work not performed directly upon the erection of the building, but which is essential to the performance of other labor and the employment of the materials to be used. This, when directly connected with the erection, has been held to be covered by the lien. Thus, where the law is that every building may be subjected to a lien "for the payment of all debts contracted for work done and materials furnished for or about its erection," it may be fairly taken to include the work of hauling the materials to the place of building. It would be unduly straining the language to exclude it. It is work about the erection of the house, and is of course charged for by the material-man, when he has the lumber, stone, brick, sand, or lime delivered by his carters. The hauling away of the clay dug out of the cellar and foundation is always considered a proper work; and there is no reason why the carter may not be a proper man to claim the lien if he did the work at the request of the owner or the contractor, and not as a mere hireling under the contractor, or under a sub-contractor.<sup>6</sup> So, under the same law, work and labor done with derricks in hoisting materials used for the construction of a building are within the law.<sup>7</sup> Where a lien is given for "labor and services" without any restriction, it includes not merely the personal or manual labor and services of the claimant, but those performed by his teams and servants.<sup>8</sup> A contractor with the

<sup>1</sup> Perkins v. Pike, 42 Me. 141.

<sup>2</sup> Peters v. St. Louis Iron M. R. R., 24 Mo. 586.

<sup>3</sup> [Scott v. Goldinghorst, 123 Ind. 268, 270, citing Phillip, § 154.]

<sup>4</sup> [Baum & Co. v. Covert, 62 Miss. 113.]

<sup>5</sup> [Casey v. Weaver, 141 Mass. 280,

281.]

<sup>6</sup> Hill v. Newman, 38 Penn. 151.

<sup>7</sup> Tizzard v. Hughes, 3 Phila. 261.

<sup>8</sup> Hogan v. Cushing, 49 Wis. 169.

owner held entitled to a lien for material prepared for use at his shop, such work being part of the "furnishing" under the contract.<sup>1</sup> A widow is entitled to a lien for the labor of her minor children.<sup>2</sup> But, as stated, the services must be immediately connected with the erection. Thus under a law giving "to every mechanic, laborer, . . . performing labor upon or furnishing materials of any kind to be used in the construction of any mining claim, building," etc., and the proof showed that the plaintiff was employed by the contractor or superintendent to cook for the men engaged in excavating a reservoir, and that the cooking was done on the ground as the work progressed, the fact that the cooking was performed at that particular place is entitled to no consideration as affecting the question of lien. If any lien exists it arises, not from the place where the cooking was done, but from the nature of the service and its relation to the work which was being constructed. If the plaintiff can assert a lien on the facts proved, he could as well have done so if the cooking had been performed at any other place; and, if the mere fact that a person is employed to cook for the laborers engaged in erecting a building entitled him to a lien, the same result would follow if he had furnished the provisions also. On the same theory a blacksmith who shod the horses, or a grain-dealer who furnished them forage whilst employed on the work, or a wagon-maker who repaired the carts of the contractor, would be entitled to a lien on the building. And, if every one who contributed indirectly and remotely to the work is entitled to a lien, no reason is perceived why a surgeon called to set a broken limb of one of the laborers, whereby he will be enabled at an early day to resume work on the building, might not assert a lien. Services of this character not performed on the building are not within the scope of this statute.<sup>3</sup> So where a lien is given to "all persons performing labor for the construction of any building," claims for ferriage, postage, etc., in aid of the performance of labor, for which latter a lien is given, are not the subject of liens.<sup>4</sup> So painting a fence and varnishing carpets are not "labor done or materials furnished for repairing" a house.<sup>5</sup> But where "all persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done," etc., hauling quartz to it is

<sup>1</sup> [Hawes v. Reliance Wire-Works Co., 46 Minn. 44.]

<sup>2</sup> [McElmurray v. Turner, 86 Ga. 215, 219.]

<sup>3</sup> McCormick v. Los Angeles, 40 Cal. 185.

<sup>4</sup> Willamette Falls v. Remick, 1 Oreg. 169.

<sup>5</sup> First Nat. Bank of Salem v. Redman, 57 Me. 405.

such labor as is secured by the lien, the labor of hauling being indispensable to the carrying of it on.<sup>1</sup> Although in another case it was said, that, in view of the equitable character of mechanics' lien laws, they are to be construed liberally to advance their objects, yet they are purely statutory and cannot be extended by construction to cases not provided for by the statutes. Thus where the lien is given for work and labor "in or upon any mine, lode, or deposit," and for materials furnished "to be used in or about any mine, lode, or deposit," a lien will not lie for hauling ores from a mine to a quartz-mill.<sup>2</sup> So in Massachusetts there is no lien under Pub. Stats. c. 191, for labor in *hauling* lumber and sand to the place where a building is to be erected. Such labor is too remote.<sup>3</sup> But in California cartage is to be added as part of the value of materials furnished.<sup>4</sup> "Tools and machinery used in working or developing a mine are to be deemed affixed to the mine,"<sup>5</sup> and work on them is work on the mine.<sup>6</sup> A lien attaches to a brick-yard fixtures, and appurtenances for labor on portable cars used in connection with the drier. Such cars are part of the realty as to a lien.<sup>7</sup> Slight alterations in a building which are merely incidental to putting in a machine which is clearly personal property, do not base a lien on the building.<sup>8</sup> In Minnesota a lien is allowed for transporting machinery to be repaired.<sup>9</sup> But there is no lien for grading and filling about a building already erected.<sup>10</sup> Incidental labor essential to the undertaking and within the contract is within the lien law. "These items may not appear to have been for either labor or materials incorporated in the actual construction of the tunnel, the road-bed, or the railway. But for aught that this record shows, every one was for labor or material as essential to the construction or to some duty to the public arising from its practical necessities, and specially stipulated for in the contract, as were the rails, the ties, or any material or labor used in the work. . . . The items here objected to are chiefly for taking down houses on the line of the tunnel for temporary bridges, sewers, water, and gas pipes, etc., necessary to the public convenience while the work was progressing, or after its completion, and specifically provided for in the contract. The weight

<sup>1</sup> *In re Hope Mining Co.*, 1 Sawyer, 710.

<sup>2</sup> *Barnard v. McKenzie*, 4 Col. 251.

<sup>3</sup> [*Webster v. Real Est. Improvement Co.*, 140 Mass. 526.]

<sup>4</sup> [*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275.]

<sup>5</sup> [Civ. Code Cal. § 661.]

<sup>6</sup> [*Malone v. Big Flat Gravel M. Co.*, 76 Cal. 578.]

<sup>7</sup> [*Curran v. Smith*, 37 Ill. App. 69; *Gray, J.*, dissenting.]

<sup>8</sup> [*Curnew v. Lee*, 143 Mass. 105, 108.]

<sup>9</sup> [*McKeen v. Haseltine*, 46 Minn. 426.]

<sup>10</sup> [*Pratt v. Duncan*, 36 Minn. 545.]

of authority in similar cases is decidedly in favor of the lien.<sup>1</sup> We wish to be understood as holding, with the authorities above cited, that labor or materials not incorporated in the structure may properly be covered by the lien, if necessary to the work and provided for in the contract."<sup>2</sup>

§ 156. **Liens for specified Labor do not include Other Work, etc.** — Where liens are given for certain specified work, the rule of *expressio unius est exclusio alterius* applies. Thus liens in the nature of mechanics' liens cannot be filed by a municipal corporation to enforce municipal charges, unless authorized by statute.<sup>3</sup> Where "every mechanic or other person who shall do or perform any work or labor upon or furnish any materials . . . for any building . . . shall have, for his work or labor done or materials, . . . a lien," etc., an agent employed to disburse money and pay off hands in the building of a house has no lien for his services, as the statute was designed to protect the interest of a different class of persons from those agents who are employed to disburse money; and if it be assumed that the plaintiff disbursed money of the defendants in paying for the labor and materials used in erecting the buildings, still a charge of commission for that service would not come within either the letter or spirit of the act.<sup>4</sup> So, if a statute gives a lien to laborers "on the production of their labor," a laborer who cultivates land, or clears and prepares the same for cultivation, is not entitled to a lien on the land for his wages.<sup>5</sup> Laborers have no lien for digging a well, under the statute giving a lien on the "production of their labor."<sup>6</sup> A laborer's lien exists in Arkansas, only for work performed in *producing* the very property against which the lien is asserted. So that one who has helped to move and re-erect a saw-mill has no lien on the lumber afterwards made in it. And a sawyer in the mill has no lien on lumber made by him, except the specific lumber for producing which his wages remain unpaid.<sup>7</sup> So the superintendent of a shingle-mill who files saws, and does other odd jobs, the night watchman, one who cleans the machinery and raises steam in the morning, and one who removes sawdust and splints from the mill, are held not entitled to a lien on the shingles sawed

<sup>1</sup> [Andrews v. St. Louis Tunnel R. Co., 16 Mo. App. 303, 304, citing Hazard P. Co. v. Byrns, 21 How. Pr. 189; Winslow v. Urquhart, 39 Wis. 263; Vandegrift and Forman's Appeal, 83 Penn. St. 127; Wil-lamette Co. v. Remick, 1 Oreg. 169.]

<sup>2</sup> [Id., see §§ 166, 159.]

<sup>3</sup> Borough of Mauch Chunk v. Shortz, 61 Penn. St. 399.

<sup>4</sup> Edgar v. Salisbury, 17 Mo. 271.

<sup>5</sup> Taylor v. Hathaway, 29 Ark. 597.

<sup>6</sup> [Guise v. Oliver, 51 Ark. 356, 358, et seq.]

<sup>7</sup> [Russell v. Painter, 50 Ark. 244.]

at the mill; but the engineer, sawyer, and all who directly assist in sawing and finishing the shingles, even the men who assort them, have a lien. The line is between immediate and remote contribution to the production of the property in question.<sup>1</sup> Under a law giving a lien to "every laborer who may aid by his labor to make, gather, or prepare for sale or market any crop," one who is employed as a general plantation laborer, and who plows, hoes, chops wood, hauls cotton, works in the blacksmith's shop, runs the engine and gins the cotton, has a lien for his entire labor upon the cotton crop.<sup>2</sup> If a person perform labor, and for a part of it he is clearly entitled to a lien, and the whole of his services are inseparably rendered and received by the owner, he is entitled to the lien for his entire compensation.<sup>3</sup> But where, in a demand filed by a person seeking to avail himself of the benefit of the act concerning mechanics' liens, services for which he might have a lien are voluntarily combined with other separate and distinguishable charges, for which no lien is given, and the whole summed up in one item, so that it is impossible to ascertain from the account filed how much of the gross charge is a lien, the party will lose the whole benefit of the act.<sup>4</sup> Where a statute provides that when "the agreement is for labor performed or furnished and for materials furnished upon an entire contract, and for an entire price," a lien for the labor alone may be enforced, if it can be distinctly shown what such labor was worth. It does not apply to cases in which finished articles of merchandise have been sold at a fixed price to a contractor, as, for example, a contract for hammered granite for a building for an entire sum.<sup>5</sup> A statement that labor was performed "in and about the mill, and the machinery," etc., is not sufficient under a statute which gives a lien for labor in "constructing, repairing, or operating" a mill.<sup>6</sup>

§ 157. **What may be included under Labor.** — The price of labor to the contractor who erects the building is composed of the actual cost to him to have it performed, and value of his own expenditure of time laid out in its behalf. The payment of these items is proper to be covered by the lien. Thus, it was held, if the mechanic engage his hands at a certain sum *per diem* and their board, he may include in his lien the wages and boarding of the journeymen; for it is a part of the compensation

<sup>1</sup> [Van Etten v. Cook, 54 Ark. 522-524.]

<sup>2</sup> [Lumbley v. Thomas, 65 Miss. 97.]

<sup>3</sup> Willamette Falls v. Remick, 1 Oreg.

<sup>4</sup> Edgar v. Salisbury, 17 Mo. 271.

<sup>5</sup> Donaher v. Boston, 126 Mass. 309.

<sup>6</sup> [Stearns v. Jaudon, 27 Fla. 469, 474.]

for his work and labor in the erection of the building.<sup>1</sup> So, where a lien was given for "supplies" to men engaged in getting out logs and timber, the word "supplies" includes the board of the men at a hotel several miles from the place where they were at work.<sup>2</sup> And in another case a contractor had a lien for what he paid his workmen, and a percentage thereon as compensation to himself.<sup>3</sup> But if a party contract to build a house for a certain price, or for whatever the job might be worth, he cannot charge for superintending his own hands; and if he undertakes to employ workmen for the owner, and to superintend them, he ought not to be paid for services as superintendent and be allowed to speculate at the same time on the wages of the workmen. As where the law gives "the mechanic, builder, artisan, workman, or laborer, or other person who may do or perform any work upon or furnish materials for any building," a lien on the same to secure the payment of the work done or materials furnished, it cannot be extended to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen.<sup>4</sup> So where a statute gives a lien for "personal services," and the object is to protect the laborer and for that purpose alone, it does not extend to the hire of a team of cattle or the value of a sled, though employed as auxiliary to the labor. The personal services which this lien protects embraces the time during which the laborer is detained at the employer's request, though no special services were required of him, while the business is getting into a condition for the labor to be resumed. If he were detained by his employer, ready to do service for him, but from any unforeseen cause his labor was not needed, he is certainly entitled to compensation. The service is in remaining with those for whom he was laboring, at their instance and for their benefit.<sup>5</sup> One rendering service in "torpedoing" a completed oil well to increase the flow of oil has a lien for his services under the statute words "labor in or about . . . any well sunk for oil."<sup>6</sup> Under a provision giving a lien to "whoever labors at cutting, hauling, rafting, or driving logs or lumber," a lien arises for "cutting, peeling, and piling," poplar logs for pulp manufacture.<sup>7</sup> No lien arises in the case of a mechanic who is employed by the owner of an engine and boiler and

<sup>1</sup> Lybrandt v. Eberly, 36 Penn. St. 347.

<sup>2</sup> Kollock v. Parcher, 52 Wis. 393.

<sup>3</sup> Anderson v. Dillaye, 47 N. Y. 678.

<sup>4</sup> Blakey v. Blakey, 27 Mo. 39.

<sup>5</sup> McCrillis v. Wilson, 34 Me. 286.

<sup>6</sup> [Gallagher v. Karns, 27 Hun, 375.]

<sup>7</sup> [Bondur v. Le Bourne, 79 Me. 21.]

appurtenances to take the same down from one place, where situated, remove them to the land of a third party, and put the machinery up in good order on that third person's land, the mill machinery (a portable one) being put on said land temporarily, in view of the supply of timber, the owners to have one half of the lumber sawed.<sup>1</sup> Under Gen. St., c. 125, s. 14, "personal services" include work accomplished by the laborer's own exertions, aided by the use of such articles of his own personal property as are essential to the service rendered; a contractor, under this statute, has no lien on account of the labor of his servants and teams, but he may have a lien for his own manual labor.<sup>2</sup> "Whether a person in the plaintiff's position, a contractor, one who assumes the responsibility of performing a certain piece of work, and employs and superintends others in the performance of it, 'labors' within the meaning of the statute granting one a lien for his 'personal services,' might be a question of no little difficulty in the absence of any judicial construction of this or similar statutes. The stockbroker, the clergyman, the student, the farmer, and the wood-chopper all labor, but in different ways, requiring the exercise of different mental and physical powers. From the original and comprehensive meaning of the word itself no reason, perhaps, could be suggested why a person who accomplishes a certain amount of work by the exercise of his mental powers, in connection with the physical exertion of others, could not be said to labor. The two classes or kinds of labor are dependent, the one on the other, and without both nothing would be accomplished. But when we study the legislative intention in the enactment of a law granting those who work chiefly through physical means certain privileges, it is possible to see that the term 'labor' is used in a restricted sense, and not in its broad and comprehensive meaning. The object of the lien laws, now almost universal, is not doubtful, on authority at least. One purpose may have been to protect the laboring man, — the man whose subsistence depends on the wages earned by his own manual labor, from the reckless improvidence of his employer, and to furnish him with ample security for his earnings, which ordinarily he could not successfully demand. If this was the intention of the legislature in the passage of the law in question, then it follows that it does not apply to contractors employing men and teams to cut and haul timber, doing no manual labor themselves, and deriving their

<sup>1</sup> [Truxall & Dummeyer v. Williams & McCallie, 15 Lea, 427, 428.]

<sup>2</sup> [Hale v. Brown, 59 N. H. 551.]

compensation from the profits realized. Most of the authorities that we have examined support this view of the law, except in cases where, from the wording of the statutes, a different intention clearly appeared. And we are not disposed to question the wisdom of those cases."<sup>1</sup>

§ 158. **Architect and Superintendent. — Foreman.**<sup>2</sup> — The labor and skill of an architect and superintendent of work upon a building are properly a part of the expense of erecting a building, and not unfrequently an indispensable and highly valuable part. As an item of such expense they enter into and help to form the value of the building, and there is no sound reason in the nature of things why the person who performs such labor and furnishes such skill should not receive the same protection as the carpenter or mason. Hence, under a statute which provides that "whoever performs labor or furnishes materials . . . for erecting . . . a house shall have a lien," etc., and "any person entitled to a lien as aforesaid shall make an account in writing of the item of labor, skill, materials, . . . or either of them as the case may be," etc., it includes persons who furnish plans and specifications for and superintend the work.<sup>3</sup> Again, where the law was that "every mechanic, workman, or other person doing or performing any work towards the erection of any building, . . . whether such work shall be performed as journeyman, laborer, cartman, sub-contractor, or otherwise," it was declared to be explicit in spirit and letter in embracing services as architect and builder.<sup>4</sup> So, where a statute gave "any person who shall perform labor, in building any house," a lien, it was held that the word "labor" included skilled as well as unskilled labor, and the architect was entitled to a lien for services in superintending the erection of a house.<sup>5</sup> In another case, where a lien was given to "all persons performing labor for the construction of any building," a mechanic who acted as overseer while performing manual labor was held entitled to a lien for all his services. When time and skill are employed to supervise and direct in the construction of a building, a lien is as much deserved and required as in any other case, and beyond question

<sup>1</sup> [Hale v. Brown, 59 N.H. 551, 558-559; citing Weymouth v. Sanborn, 43 N. H. 171; Balch v. N. Y. & O. M. R. R., 46 N. Y. 521; Parker v. Bell, 7 Gray, 429; Stryker v. Cassidy, 17 N. Y. (S. C.) 18; Wentroth's Appeal, 82 Penn. St. 469; Jones v. Shawhan, 4 N. & S. 257; Ericsson v. Brown, 38 Barb. 390; Aiken v. Wasson, 24 N. Y. 482; Sullivan's Appeal, 77 Penn. St. 107; Winder v.

Caldwell, 14 How. 434; Hoatz v. Patterson, 5 W. & S. 538.]

<sup>2</sup> This section was cited with approbation in Mutual Ben. L. Ins. Co. v. Rowand, 26 N. J. Eq. 397.

<sup>3</sup> Knight v. Norris, 13 Minn. 473.

<sup>4</sup> Mulligan v. Mulligan, 18 La. An. 20.

<sup>5</sup> Stryker v. Cassidy, 76 N. Y. 50; reversing same case in 17 N. Y. Supr. Ct. 18.



it should be allowed if actual labor be added to the other grounds of right. There is doubt as to whether an architect, or person performing labor of like nature, can hold a lien; but it is clear that for work of any kind upon the building in its construction the statute gives a remedy. Whatever enters into or is connected with a building, essential to its use, ought to be treated as a part of the building, so that all who contribute their toil to make it valuable may have an equal chance to obtain compensation for their labor. Much of the claimant's labor in this case was expended upon a dam or breakwater attached to, and for the use of, the company's mills; and it was contended that for such labor he was not entitled to a lien upon the mills. This view of the statute seemed to the court to be both unreasonable and unequal, for a mill made to run by hydraulic power would be worthless without the structures necessary to obtain water; and the labor bestowed upon such structures is of the same utility and importance to the owner of the mill as the labor upon the mere building.<sup>1</sup> An architect who draws the plans and superintends the construction of a building has a valid lien for his services.<sup>2</sup> So where a party, although denominated an architect, is under employment by the owner or contractor of a building, and devotes his time in making plans and drawings of the work to be done, and in directing and overseeing its execution in accordance therewith, he is protected by a provision which secures a lien "for work done or materials furnished for or about the erection or construction of a building." The service here performed was labor, — mechanical labor of a high order, — contributing its proportionate value to the beauty, strength, and convenience of the edifice. It was as meritorious as mere manual labor with the tools of a trade. Both are necessary to the accomplishment of the end in view, and both are necessary to the progress of the building, and were performed in and about its construction. The object of the legislation was to secure mechanics and material-men whose labor, skill, and materials were employed upon and used in buildings. The generality of the provision, however, casts upon the courts the duty of ascertaining, not only who are entitled to the benefits of the act, but what kind of services are within its protection. The contract in this case denominated the plaintiff an architect. That he was at the same time a mechanic is evident from his being required, not only to draw the plans of the work to be done, but to assume

<sup>1</sup> Willamette Falls v. Remick, 1 Oreg. 169.

<sup>2</sup> Mutual Ben. L. Ins. Co. v. Rowand, 26 N. J. Eq. 389.

the duty of explaining and directing its proper execution. This work is often done by the master mechanic, and is as essential to the due construction of a building as is the purely mechanical part; for, without it, shape, symmetry, and proportion would be wanting, — elements, not of beauty alone, but of strength and convenience in every superstructure. To preserve these elements, some architectural skill is required, but is generally exercised in ordinary buildings by a mere mechanic by occupation. This would certainly not impair his right to a lien as such mechanic. A mere architect — and he may be such without being an operative mechanic — who draws plans in anticipation of buildings, usually to enable the builder to determine the kind he will erect, could hardly be supposed to be within the above act. But very distinguishable from this is the case of a party employed to devote his entire time to a building, and who draws the plans for every part of the work and directs its execution according to such plans and specifications.<sup>1</sup> In a subsequent case under the same statute, it was held that the mere drawing of the plan and writing out the specifications is no more of this character than would be the work of an attorney in preparing the contract. The case is different, however, when he is to direct and oversee its erection in accordance therewith.<sup>2</sup> When an architect has a lien for such work, as superintendence, which comes within the statute, he must set it forth, as it is not shown by the name of his calling.<sup>3</sup> So, the lien of an architect employed to superintend a patent erection may be enhanced by the patent right, he being the owner.<sup>4</sup> So, where a foreman of a mine is employed to “boss” the men at work in a mine, keep their time, and give orders for their pay, he will be entitled to a lien.<sup>5</sup> But on the other hand, it was held, under a statute providing a lien for “carpenters, joiners, brick-masons, stone-masons, plasterers, painters, brick-makers, lumber-merchants, and all others performing labor and furnishing materials,” etc., that an architect or superintendent of a building has no lien by reason of his services, as the character of labor performed by him is not such as is embraced by such a statute.<sup>6</sup> So, under a statute giving a “laborer” a lien for his wages upon the crop or land, it was held that it did not include an overseer, who was an agent to represent the owner, and not to labor.<sup>7</sup> The mere

<sup>1</sup> Bank of Penn. v. Gries, 35 Penn. 423;  
Jones v. Shawhan, 4 Watts & S. (Penn.)  
257.

<sup>2</sup> Price v. Kirk, 90 Penn. 47.

<sup>3</sup> Rush v. Able, Id. 153.

<sup>4</sup> St. Clair Coal Co. v. Martz, 75 Penn.  
384.

<sup>5</sup> Capron v. Strout, 11 Nev. 304.

<sup>6</sup> Foushee v. Grigsby, 12 Bush (Ky.), 83.

<sup>7</sup> Whitaker v. Smith, 81 N. C. 340.

fact that the claimant acted as overseer as well as workman, will not prevent his lien for his work.<sup>1</sup> In Missouri the law gives no lien against a building for superintending the construction thereof.<sup>2</sup> A superintendent or contractor who does not labor personally has no lien under a law which provides, "Any person who shall do labor upon any farm or land, in tilling the same, or in sowing, or harvesting, or laboring upon, or securing or assisting in securing, or housing any crop or crops sown or raised thereon during the year in which said work or labor was done, such person has a lien upon all such crop or crops as shall have been raised upon all or any of said land for said work and labor." It is said that as lien laws are required to be liberally construed (sec. 1981), "any person who shall do labor upon any farm," etc., can be extended to cover those who labor through others, that is, by employing laborers, as in this case. The object and purpose of the lien law is apparent. It was intended to secure and protect personal earnings of laborers beyond question, and whether a man, because he may be doing labor, yet in the same labor is employing other laborers, and is thus also an employer or contractor, can come within the scope of this act, is a very important question. So far as he may actually labor, he may come within the beneficent provisions of this law; but so far as his service consists in looking after his laborers and supervising his contract, this comes more in the line of a business employment or speculation than of personal labor. . . . It is said that as the laborer with his sickle is allowed a lien, so the contractor or employer of a large body of men doing this for him is to be substituted for the single harvester, from the needs of a larger and more extensive system of farming. This is an admirable argument to address to the legislature, perhaps, for enlarging the operation of the law; but the court cannot consider it unless the reason or purpose can be gathered from the language of the act. That the purpose of a lien was for the benefit of mechanics or laborers is evident; they are usually poor men, dependent on their daily earnings, and can ill afford to lose this, or indulge in the uncertainties of litigation. The employer or contractor is, as a rule, just the opposite, and for this reason the object or purpose of a lien law for one by no means makes an argument for the other. A laborer may own a team of horses or a machine and not be debarred from claiming or having a lien for his labor combined with these; they are merely a part of his

<sup>1</sup> [Foeder v. Wesner, 56 Iowa, 157.]      18; Gauss v. Hussmann, 22 Mo. App.

<sup>2</sup> [Murphy v. Murphy, 22 Mo. App. 115.]

labor, his implements, the means by which he labors and earns; but when he adds to these other laborers, he then becomes an employer or a contractor, as in this case.<sup>1</sup> A claim by an architect for preparing drawings and specifications for the house against which his claim is entered is not the subject of a mechanics' lien.<sup>2</sup> A statute conferring a lien for "services of an architect or superintendent in building, altering, repairing, or ornamenting any house or other building or appurtenance thereto," does not give a lien to an architect for keeping books and auditing accounts, nor for superintending the improvement of "grounds and accessories."<sup>3</sup> A statute of the territory of Utah declared, "Any person or persons who shall perform any work or labor upon any mine, or furnish any materials therefor, in pursuance of any contract made with the owner or owners of such mine or of any interest therein, shall be entitled to a miner's lien for the payment thereof upon all the interest, right, and property in such mine, by the person or persons contracting for such labor or materials at the time of making such contract. Said lien may be enforced in the same manner and with the same effect as a mechanics' lien, as provided by the laws of Utah." Under this law a corporation by its general agent and manager employed the plaintiff for an indefinite time to direct the *work*, with authority to employ and discharge miners and procure supplies. Under this employment the plaintiff performed said duties, and in the performance thereof did some manual labor. It was held, that the plaintiff was not the general agent of the mining business, that he was not a contractor, nor were his services of a professional character, such as those of a mining engineer; but that he was the overseer and foreman of the body of miners, with duties similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and

<sup>1</sup> [Mohr v. Clark & Curtis *et al.*, 3 Wash. Tr. 440, 443, 444.]

<sup>2</sup> [Price v. Kirk, 13 Phil. 497.]

<sup>3</sup> [Adler v. World's Pastime Exposition Co., 126 Ill. 373, 376.]

labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance, and the discharge of them may well be called work and labor, entitling the plaintiff to a lien under the statute. It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is mere professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to the foregoing, that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon as for work and labor.<sup>1</sup>

*Materials : —*

§ 159. **Materials protected by Lien.**<sup>2</sup> — The fair and reasonable interpretation of the language, "any materials furnished for building," is, that the right of lien extends to all such materials as ordinarily enter into or are used in the construction of buildings, and which are within the express or implied terms of the building contract made between the owner and contractor. Therefore, where a building contract requires the rock upon the land to be blasted and removed, preparatory to building, powder and fuses necessarily used for that purpose come within the term "materials."<sup>3</sup> So, where a law gave a lien on a mine for "timber or other materials to be used in or about the mine," powder, steel, and candles, indispensable articles for working the mine, were clearly within the statute.<sup>4</sup> Mining cars are "material," and probably fixtures also.<sup>5</sup> It seems that under a statute giving the lien for "any materials furnished for building," a person furnishing lightning rods to a building would be within its protection.<sup>6</sup> So in Iowa a lien may be enforced for labor and materials, in the erection of lightning-rods, regardless of the question of the utility of such rods.<sup>7</sup> Also hoisting apparatus necessary for and used in the erection of a building.<sup>8</sup> But in another State where a law gives the lien for materials and labor "in building, altering, repairing, or ornamenting" a house, furnishing materials and labor in placing a lightning-rod on a house was held not to be included under this law.<sup>9</sup> Where the law

<sup>1</sup> [Mining Co. v. Cullins, 104 U. S. 176.]

<sup>2</sup> [See § 151.]

<sup>3</sup> Hazard Powder Co. v. Byrnes, 12 Abb. Pr. 469; s. c. 21 How. Pr. (N. Y.) 189.

<sup>4</sup> Keystone v. Gallagher, 5 Col. 23.

<sup>5</sup> [Central Trust Co. v. Coal I. & R. Co., 42 Fed. R. 106 (Ala.) See § 175.]

<sup>6</sup> Quimby v. Sloan, 2 E. D. Smith (N. Y.), 594.

<sup>7</sup> [Harris v. Schultz, 64 Iowa, 539. The court said that Drew v. Mason, 81 Ill. 498, was under a different statute.]

<sup>8</sup> Dixon v. La Farge, 1 E. D. Smith, 722.

<sup>9</sup> Drew v. Mason, 81 Ill. 498.

makes every building subject to a lien for the payment "of all debts contracted for work done or materials furnished for or about the erection or construction of the same," it seems that a lumber-merchant has a lien for lumber furnished to make shelves for a vault which formed part of the original plan of the building.<sup>1</sup> The word "lumber" has been held to include shingles;<sup>2</sup> and "timber," railroad ties.<sup>3</sup> Where a homestead is made subject to mechanics' liens, "for the erection of improvements thereon, or for labor performed for the owner thereof, in improving the property," a manufacturer of lumber has a lien on the homestead for the value of the lumber furnished.<sup>4</sup> Giant powder furnished by the manufacturer to a contractor for the construction of a railway, and used by the latter in the progress of such work, is "material" within the purview of the lien law.<sup>5</sup> A plant for generating electric light on a steamboat is "material furnished about the erection and construction, alterations or repairs" of the boat within the meaning of sec. 1378, code 1880, in relation to the lien of mechanics.<sup>6</sup> There is no lien for furnishing a portable stove.<sup>7</sup> A material-man is not entitled to a lien for materials furnished to the contractor for his temporary use in the erection of the building, and not to form a part of the structure, even though they may have been furnished on the credit of the building.<sup>8</sup> The Texas law gives a lien for wages due for labor in the construction or repair of a railway, but none for materials in such case. And one who furnishes ties, though prepared for use by his personal labor, has no lien, — he is only a seller of ties.<sup>9</sup> There will be a lien for materials delivered in good faith to the contractor at the site of the building, though not actually put into the structure.<sup>10</sup> A lien may exist under a State statute for materials for a railway, though delivered out of the State.<sup>11</sup> The fact that materials put into a building here were sold and delivered in another State does not impair the lien.<sup>12</sup> It is not necessary to a lien that the materials should be delivered at the site of the building. If furnished for the building and delivered elsewhere at the request of the owner, or if he

<sup>1</sup> *Harker v. Conrad*, 12 Serg. & R. 301.

<sup>2</sup> *Gross v. Eiden*, 53 Wis. 543.

<sup>3</sup> *Kollock v. Parcher*, 52 Wis. 393.

<sup>4</sup> *Gulledge v. Preddy*, 32 Ark. 433.

<sup>5</sup> [*Giant Powder Co. v. Oregon Pac. Ry. Co.*, *et al.*, 42 Fed. R. 470.]

<sup>6</sup> [*Mulholland v. The T. H. E. Co.*, 66 Miss. 339.]

<sup>7</sup> [*Harrison v. Homœopathic Association*, 134 Penn. 558, 566; see § 175.]

<sup>8</sup> [*Oppenheimer v. Morrell*, 118 Penn. 189.]

<sup>9</sup> [*Railway v. Mathews*, 75 Tex. 92.]

<sup>10</sup> [*Irish v. Pheby*, 28 Neb. 231, 237; *Foster v. Dohle*, 17 Neb. 631; *Phoenix Iron Co. v. Vessels, &c.* 43 Hun, 429, 432.]

<sup>11</sup> [*Thompson v. St. Paul Ry. Co.*, 45 Minn. 13, 16.]

<sup>12</sup> [*Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170.]

prevents delivery at the building by wrongful refusal to receive materials prepared for it, the lien attaches. The Texas statute does not require that the materials should have entered into the building.<sup>1</sup> The fact that goods were delivered at the shop of a contractor prior to beginning the erection of a building is not a defence.<sup>2</sup> But the lien extends only to materials used in or delivered at the building (or elsewhere under the contract) for use therein, but not to materials contracted for by the contractor, and not so used or delivered.<sup>3</sup> No lien exists for work or materials put on the house after the owner has rescinded the contract. The only remedy in such case is action of damages against the owner for breach of the contract.<sup>4</sup> In Illinois there is no lien until the materials are attached to the property under authority of the owner. Where C. bought machinery, but before it was attached to the mill C. sold the mill to H., and the engineer attached the machinery to the engine without the knowledge or consent of H., who immediately on knowing of it disclaimed the act, and detached the machine, it was held that no lien was created.<sup>5</sup> So in Kansas the materials must not only be purchased for the fence, building, or improvement, it must be actually used in the fence, building, or other improvement for which it was purchased.<sup>6</sup> The material must have been furnished *to be used, and have been actually used*, upon the structure on which the lien is claimed.<sup>7</sup> When A. is engaged to furnish materials and work to repair an old house, but after a few days the project is abandoned, and A. is engaged to build a new house on the same site, no lien attaches to the latter house for work and materials furnished under the first contract, unless they were used in the new house.<sup>8</sup> Building materials sold by lumber dealers to a sub-contractor, engaged in building a railroad, and delivered to him for use in erecting boarding shanties and stables for men and animals employed by him, are "furnished in the construction" of the railroad within the meaning of the statute.<sup>9</sup>

§ 159 *a*. **No Lien for Money advanced for Building Materials.**

— The intention of many of the statutes aims to secure the mechanic, laborer, or material-man individually; and when such

<sup>1</sup> [Trammell & Co. v. Mount, 68 Tex. 210; see §§ 149, 150, 155.]

<sup>2</sup> [Stevenson v. Dick, 13 Phil. 132.]

<sup>3</sup> [Poster v. Dohle, 17 Neb. 631, 633-634; Marrener v. Paxton, Id. 634.]

<sup>4</sup> [Horr v. Slavik, 35 Ill. App. 140.]

<sup>5</sup> [Cox v. Colles, 17 Bradw. 503.]

<sup>6</sup> [Hill v. Bowers, 45 Kans. 592.]

<sup>7</sup> [Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 513; Bewick v. Muir, 83 Cal. 368.]

<sup>8</sup> [Nichols v. Culver, 51 Conn. 177, 182.]

<sup>9</sup> [Stewart-Chute Lumber Co. v. M. P. R. Co., 28 Neb. 39, 45, 51.]

is the case its beneficial provisions cannot, by any operation of equitable subrogation, be transferred to others. Accordingly, money advanced by one party to another to enable him to erect and prepare a steam mill and apparatus creates a debt from the party to whom the money is advanced, but is not a lien on the steam mill and apparatus.<sup>1</sup> So, where a statute provides that "all mechanics, lumber-merchants, . . . performing labor or furnishing materials for the construction of any building," etc., shall have a lien, one who advances as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the above law. But the same may be an equitable lien on the premises, if it were understood, either expressly or impliedly, that it was to be repaid out of them; and this, though the agreement was by parol, as it is not within the statute of frauds.<sup>2</sup> Where "all persons furnishing saw-mills with timber, logs, provisions, or any other thing necessary to carry on the work of saw-mills, shall have a lien," creditors furnishing money have no lien thereunder.<sup>3</sup> Although a mechanics' lien law protects any person furnishing "materials" entering into the construction of the house on a homestead, it does not protect a loan of money made and used for the purchase of material used for it.<sup>4</sup> A debt not for work or materials will not base a mechanics' lien.<sup>5</sup>

§ 160. **No Preference between Labor and Materials.** — There is no preference in the lien of labor over that of materials. Thus, where "all mechanics, lumber-merchants, . . . performing labor or furnishing materials for the construction of any building, . . . shall have a lien," etc., the lien for materials and lien for labor are placed on the same equality, and it is error to refuse to distribute the proceeds accordingly.<sup>6</sup> Nor is there any reason for excluding any of the substances or things furnished which, when put together, go to make the building. One kind of material has no preference over another, as they are all equally a part of the entire structure and necessary to its perfection. They are usually purchased by the builder; and, in the present state of the country and of trade and business, some must be purchased, such as boards, timber, shingles, clapboards, nails, etc., many of them in a very rough state, all of them more or less improved from their original condition. The nail is made perfect

<sup>1</sup> *Weathersby v. Sleeper*, 42 Miss. 741.

<sup>2</sup> *Godeffroy v. Caldwell*, 2 Cal. 489.

<sup>3</sup> *Dart v. Mayhew*, 60 Ga. 104.

<sup>4</sup> *Gaylord v. Loughridge*, 50 Tex. 573.

<sup>5</sup> [*Brown v. Rodecker*, 65 Iowa, 55.]

<sup>6</sup> *Moxley v. Shepard*, 3 Cal. 64.



from the iron, and requires no further labor upon it for use; and so of screws and locks; and from the great improvements in modern days and the more extended subdivision of labor, other materials for dwelling-houses are in a state quite as nearly prepared for annexation; but they are still materials. The results of the labor of one mechanic are becoming more and more the materials for the labor of another. They cease to be such only when incorporated into the building by the builder. In effecting this, it makes no difference what is the amount of labor, or whether it is bestowed in adapting the materials to the building or the building to the materials; and, because it is impossible to define any precise state in which they shall be furnished, they may be furnished in any state in which they can be put in and made part of the structure. The owner is not injured by this; his building is sooner completed, and the cost is no more than if it were wrought by the builder wholly out of the roughest materials. It is of no consequence of whom they are purchased or procured, and in what quantity originally, as the contractor is protected for only a single cask or even pound of nails, if he furnish no more, though he may have purchased and have had on hand a hundred, and though he is in the habit of selling to others. The moment the inquiry is entered into, whether they are articles of merchandise, it is found that all the contractor's materials are such in any state in which he can have them. If he shall have no lien for such as he keeps for sale, he is debarred from selling at all, when it is most convenient for him and most for the benefit of his employer. It is sufficient that the materials are furnished, without regard to the manner or quantity in which they were originally acquired.<sup>1</sup> So where "any person to whom a debt is due for labor performed or for materials furnished . . . in the erection of any building . . . shall have a lien on such building," etc., it attaches for the cost of materials as well as labor.<sup>2</sup>

§ 161. **Quality and Quantity of Materials must agree with Contract.** — In those States where the lien is secured to the material-man for materials furnished to the contractor as a limited agent, it is important for the material-man to inquire how far they are proper in quality and quantity for the building he proposes to credit. It has been said that, where the law allows contractors to purchase materials on the credit of a building the law does not relieve the material-man from inquiring into the nature of

<sup>1</sup> Sweet v. James, 2 R. I. 270.

<sup>2</sup> Busfield v. Wheeler, 14 Allen (Mass.), 139.

the building he trusts, whether it is frame or brick, whether it is a one or three story house, or whether it is large or small; that, in short, he cannot furnish materials enough to complete a three-story house of the largest dimensions, when the materials are intended for a house of the most inferior description. Whenever the building is credited, immediately it should suggest the propriety of making the necessary inquiries as to size, materials, and nature of the intended erection. A trifling excess over what the most rigid economy would require should not vitiate the account, — that would be an unjust restriction; but when it is obvious that it is the result either of negligence or fraud, sound policy, and a just regard to the interests of owners require that the consequences should be visited on his own head. In such case, therefore, it is competent for the owner to give evidence to prove that the amount of the lumber charged in the material-man's account is greatly more than could have been put into the building.<sup>1</sup> But where the materials furnished are of the kind that would induce a careful, prudent, and skilful man, acquainted with the building, to believe that they could be usefully employed in its erection, then the material-man is not bound to inquire into the character of the materials which the contractor had agreed with the owner of the building to use in its construction.<sup>2</sup> A material-man cannot justly charge the building, when contract is made with the contractor, for all the materials he may choose to furnish on its credit, without reference to the quantity or quality needed. He must, in his supplies, regard the size and apparent character of the building; and his lien cannot go beyond what these show to be reasonable. This principle is identical with that which sometimes allows strangers to supply necessities to the members of a family on the credit of its head; the allowance is not measured by the mere will of the supplier, nor by the financial ability of the head, but by the necessity of the case, regard being had to the style in which the family is accustomed to live, of which the supplier must inform himself. Nor can a material-man have a lien for materials furnished for a particular purpose, and which are unfit for it. His occupation requires him to know whether his materials are fit for the purpose for which they are provided. It is involved, in the very fact of furnishing them to a contractor of the building on its credit, that he should know its character, and that they must, at least apparently, be adapted to it. To

<sup>1</sup> Dickinson College v. Church, 1 Watts & S. (Penn.) 462.

<sup>2</sup> Odd Fellows' Hall v. Masser, 24 Penn. 507.

furnish to a contractor at his pleasure, and without regard to the size and character of the building, is really to furnish on his credit, and not on the credit of the building, — at least, so far as the materials are unfit or manifestly excessive. So where an article, a heating apparatus, is to be furnished on condition that it answers the purposes, and it does not, there is no lien; and, without this express condition in a contract, there is no lien if furnished by a sub-contractor, and it is not proper, and has to be taken out. But, if materials be furnished on order of the owner of the house, these rules do not apply; for a man may pledge his own property for any kind of materials.<sup>1</sup> Sub-contractors who furnish materials upon the credit of buildings must not deliver more than can reasonably be used in their construction.<sup>2</sup> In another case it was further said that the justice of this limitation of the right of the sub-contractor is very plain; for, if it were otherwise, no man could ever build a house with any certainty as to the cost of it, unless he employed all the workmen, and purchased all the materials himself. He might find it built of an entirely different character from that contracted for, and yet have to pay the sub-contractor though the contractor could have no claim upon him. If such were the case, no prudent man would make a contract to have a house erected, except with a builder who had ample means to secure him against liens, and such men could only obtain the most desirable contracts.<sup>3</sup> So, where a contract secures a lien only to the extent of labor or materials performed or furnished “in pursuance of the contract entered into between the owner and contractor,” a sub-contractor or laborer has no lien for extra work not in any manner provided for in the contract.<sup>4</sup> But when the materials are within the scope of a contract, a lumber merchant has his lien, whether they are used in a usual or necessary manner or not.<sup>5</sup>

§ 162. **When no Lien for Machinery.** — Furnishing machinery for the successful operation of a manufactory, although attached to the building, has for the most part been held not to be protected by the mechanics’ lien, unless the legislature has signified that such was its intention. Thus, where a statute provided for a lien for “materials furnished and services rendered in the construction, erection, or repairs of any building,” and the materials and labor furnished were in equipping with fixed machinery for the manufacture of paper a building intended in

<sup>1</sup> Harlan v. Rand, 27 Penn. St. 511.

<sup>2</sup> Boyd v. Mole, 9 Phila. 118.

<sup>3</sup> Campbell v. Scaife, 1 Phila. 187.

<sup>4</sup> Foley v. Alger, 4 E. D. Smith (N. Y.), 719.

<sup>5</sup> Harker v. Conrad, 12 Serg. & R. (Penn.) 301.

its erection as a paper-mill, but which was in itself a complete and independent structure, they cannot be regarded as furnished for the construction or reparation of a building, and no lien attaches for them.<sup>1</sup> So, where a lien was given "for work and labor performed on any building, and all material furnished in and about such work and labor," no lien was given for machinery placed in a building, or otherwise on land.<sup>2</sup> So, when the lien is "to the mechanic or undertaker who shall build or repair, either in whole or in part, a house, fixtures, or improvements, or who shall furnish materials in such building or repairing," it does not embrace machinery which was intended to be used in such house for manufacturing purposes.<sup>3</sup> In another case in the same State, where an iron-merchant contracted with the agent of the defendant to furnish the iron and castings necessary for the factory, it was said that it was not the intention of the law last above cited to provide a lien to him who sells, to a company or an individual, machinery to put into a house built for manufacturing, any more than to a cabinet-maker for the furniture to go into a new building.<sup>4</sup> Where the statute gives to a person furnishing labor in erecting, altering, or repairing a building or appurtenances a lien upon such building, and on the lot on which it stands, there is no lien for labor in altering machinery in a mill, unless it is affirmatively shown that such machinery is of that character that makes it a part of the realty.<sup>5</sup> So if it be provided that every building "shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same," and the act is subsequently extended to every steam-engine, coal-breaker, fixture, or machinery, etc., in and about mills of any kind, etc., and the original law only gave a lien for new erections, the amended law does not extend it to alterations and changes; and therefore, where fixtures or machinery of a different kind and character is merely substituted in the place of that which was before in the building, the building is not subjected to the lien.<sup>6</sup> In a later case it is said that where new machinery is furnished for and placed in an old mill the party supplying the same is not entitled to a mechanics' lien against the building. It is possible that if in the case in hand there had been any repairs, alterations, or additions to the building, and the

<sup>1</sup> *Rose v. Perse*, 29 Conn. 256.

<sup>2</sup> *White v. Chaffin*, 32 Ark. 68; *Cohen v. Hager*, 30 Ark. 28.

<sup>3</sup> *E. T. Iron Man. Co. v. Bynum*, 3 Sneed (Tenn.), 268.

<sup>4</sup> *Greenwood v. Tennessee Man. Co.*,

2 Swan, 130.

<sup>5</sup> *Baker v. Fessenden*, 71 Me. 292.

<sup>6</sup> *Summerville v. Wann*, 37 Penn. St. 182.

two machines had been furnished therefor, or had been rendered necessary thereby, a lien might have attached. It would have attached by reason of the repairs, alterations, or additions to the building and the relation of the machinery thereto. It was urged, however, that the machines referred to were an addition, alteration, or repair to the building in which they were placed. This would be carrying the doctrine of constructive liens too far. When the legislature referred to the repair of a building it did not mean a machine.<sup>1</sup> A statute giving a lien for materials used in and about the construction of bridges does not give a lien to one who sells the contractor machinery with which to crush stone for the bridge building. Such machinery is part of the contractor's plant, and in no sense material for the bridge.<sup>2</sup> Shells designed for use by cloth printing machines are held not to be parts of those machines. The purpose of the mechanics' lien law is to afford mechanics a lien upon machinery of which they cannot have such possession as would give them a lien by the common law. This statutory lien is confined to fixed machinery. Where machinery is of such a character that the common-law lien may be had upon it, doubts should not be so resolved as to hold the machinery to be also subject to the statutory lien.<sup>3</sup>

§ 162 *a*. **When Lien exists for Machinery, etc.** — Many States have by subsequent enactment amended their lien laws so as to protect with the lien machinery placed upon land. Thus, where a statute gave a lien "for work done or materials furnished for the construction or repairing of a building, wharf, or superstructure," and machinery was sold for the purpose of being placed in a building owned by the vendee, with a view of converting it into a manufactory, and was actually used for that purpose; the vendor had a mechanics' lien upon the building for the price.<sup>4</sup> A pump sold to be used in water-works, and affixed to the pipes of said works, comes within the lien law.<sup>5</sup> One who contracts to drill an oil well and to furnish the tools, ropes, fuel, etc., to be used in the drilling, can file a lien under a law that "all persons doing work for, on, or about the erection, construction, or repair of any engine, engine-house, tanks, derrick, building, machinery, erected upon any leasehold, or for boring, drilling, or mining," etc.<sup>6</sup> The machinery, as a rule, must be attached

<sup>1</sup> [Haslett v. Gillespie, 95 Penn. 371, 375.]

<sup>4</sup> Donahue v. Cromartie, 21 Cal. 80.

<sup>2</sup> [Basshor & Co. v. Balto, 65 Md. 99, 103.]

<sup>5</sup> [Goss v. Helbing, 77 Cal. 190, citing Donahue v. Cromartie, 21 Cal. 80.]

<sup>3</sup> [Griggs v. Stone, 51 N. J. L. 549; Penn. 131. see § 178.]

<sup>6</sup> Vandergrift & Forman's Appeal, 83

to and become part of the realty. As, where the lien is given for "any materials, fixtures, engines, boilers, or machinery for any building, upon land," the machinery must be such as becomes a fixture and a part of the realty; or, at least, such as is necessary in the erection of the improvements. The lien will not attach on account of a carding-machine.<sup>1</sup> So, where "all machinists, who may furnish or put up any steam-mill, shall each have a special lien on such real estate and factories," they have no lien unless the machinery furnished is attached to, and becomes incorporated with, the realty for which it was furnished.<sup>2</sup> Again, where every person shall have a lien "who shall construct, repair, or put up any machinery upon such land," it is not within the terms of the statute to create a lien in favor of parties who merely sell machinery which may or may not go into a building in the State as the purchaser determines. The contract should relate to the land and be performed on it.<sup>3</sup> In another case it was held that where ranges and furnaces were sold as personal property, there was no lien, but if by the contract they were to be furnished as parts of houses to be built, and were in fact so applied, then a lien existed. Such a question was one of mixed fact and law, and where the judge tried the cause without a jury, and it not appearing that he erred in applying the above principles of law, exceptions were not sustained.<sup>4</sup> So, where "every person who shall furnish any machinery or fixtures, for any building, erection, or other improvement on land," etc., under the term "machinery," as used in the above statute, an ordinary sausage-grinder or coffee-mill, such as are used in families, would not be deemed "machinery," so as to confer a lien. But, if a man had fitted up a house for grinding sausage-meat, or parching or grinding coffee, in large quantities for market, a lien would exist under the statute.<sup>5</sup> Under the statute last mentioned, it includes machinery for a building already constructed, as well as one in the process of construction.<sup>6</sup> Where a lien is given for machinery, the fact that the work was not done on the ground, but at a distance in shops, does not invalidate it.<sup>7</sup> Items furnished for repairs come fairly within a continuing agreement to furnish whatever shall be required in the way of fixtures and machinery for a manufacturing establishment, and they may properly constitute a part

<sup>1</sup> *Graves v. Pierce*, 53 Mo. 423.

<sup>2</sup> *Schofield v. Stout*, 59 Ga. 537; *Loudon v. Coleman*, Id. 654.

<sup>3</sup> *Stout v. Sawyer*, 37 Mich. 315.

<sup>4</sup> *Turner v. Wentworth*, 119 Mass. 459.

<sup>5</sup> *White v. Chaffin*, 32 Ark. 70.

<sup>6</sup> Id. 69.

<sup>7</sup> *Parrish & Hazard's Appeal*, 83 Penn. 111.

of an account filed for a lien.<sup>1</sup> Under a law that extends the lien "to all improvements, engines, pumps, machinery, screens, and fixtures, erected or put up by tenants of leased estates," it was held that the lien does not apply to "dwelling-houses" erected by tenants for years, independently of the works referred to in the act. The term "improvement" in the act covers only useful and important erections constituting part of the works placed there by the tenant.<sup>2</sup>

§ 163. **Labor and Materials for Forbidden Erections.** — The principle is of general application, that contracts contrary to sound morals, public policy, or forbidden by law, will not be executed by courts of justice. Although the rule is plain and definite, difficulties sometimes arise in its practical application. If an improper use be made of goods innocently sold, or if the results of honest labor be devoted to improper purposes, the agent or vendor ought not to be visited with the penalty; yet, if he intend to assist in the illegal act, he is a party to its unlawfulness, and deserves no aid from the law.<sup>3</sup> A man is deemed to intend the thing he sells or makes shall be appropriated to its ordinary use. If that ordinary use be innocent, he is not chargeable with a subsequent misapplication. If a carpenter build a house, he is not to be presumed to do it for bad purposes; yet even here, if he intend to build a brothel or to assist in a burglary, he ought not to have the fruits of his labor. And, if the ordinary use of the thing produced be illegal, he must be taken as intending the use and as privy to the illegality, and therefore entitled to no benefit for his labor. And so if a party assist in constructing a ninepin alley appurtenant to a coffee-house, which is made illegal by express statute, it is an erection *sui generis*, whose ordinary use is unlawful, and the builder cannot recover.<sup>4</sup> But where the keeping of a ninepin alley of itself is not unlawful, furnishing materials for it, not knowing it was to be used for gaming, will not prevent a lien. To make good such a defence, it should appear that the plaintiff knew at the time of the sale that the lumber was to be put to an unlawful purpose, and that he sold it with the intention of having it used for such unlawful purpose.<sup>5</sup> But in the following case, however, this knowledge on the part of the builder was held not sufficient to prevent his recovery. To a suit by a

<sup>1</sup> Allen v. Frumet Mining Co., 73 Mo. 688.

<sup>2</sup> Schmidt v. Armstrong, 72 Penn. 355.

<sup>3</sup> Cundell v. Dawson, 4 Man. Gr. & Scott, 376.

<sup>4</sup> Spurgeon v. McElwain, 6 Ohio, 444.

<sup>5</sup> Dorsey v. Langworthy, 3 Greene. (Iowa), 341.

mechanic on a building contract, the defendant answered that she had the house built for a house of prostitution, and that plaintiff, when he undertook and erected the house, well knew such to be its destined use, contrary to good morals, etc. This answer was deemed frivolous, there being no allegation that the plaintiff was to be concerned or interested in the contemplated illegal uses of the building. The court cited the following authorities, where knowledge by the vendor of goods of the illegal purpose for which they are to be used was no defence against an action brought to recover their price.<sup>1</sup> A clerk in the office of a dealer in lottery tickets, where lotteries are prohibited by law, can recover his salary.<sup>2</sup> The vendor of billiard tables can recover the price of such tables, although used for gambling purposes.<sup>3</sup> An action for clothes sold to a prostitute, or for washing her apparel, cannot be defeated by merely showing that the plaintiff was aware of the defendant's situation, although from the nature of the articles the plaintiff might have known the object and purpose for which they were intended.<sup>4</sup> If the plaintiff is in any way the gainer by or the partner in an illegal contract, one which is *contra bonos mores*, he cannot recover upon such contract. But all houses are not built for the purpose of prostitution, nor are all billiard tables to be used for gambling purposes; and, to defeat an action by such a defence, it must be shown that the plaintiff is himself directly connected with the criminal or illegal act.<sup>5</sup> Where a law, as the Bankrupt Act, has the effect to annul the contracts of a party, no claim can be allowed for work done or materials furnished after the filing of the petition in bankruptcy.<sup>6</sup>

*Erection or repair:—*

§ 164. **What does not constitute Erection or Repair of Buildings, etc.**—What part of the work done and materials furnished by mechanics and others may be properly said to contribute towards the erection or repair of a building depends largely upon the language of the particular statute under investigation. It is clear that all labor and materials which contribute to the erection of the structure itself are protected by the lien. The difficulty does not arise in these cases. But there are frequently so many objects of labor which are incidental to the enjoyment of

<sup>1</sup> 32 Vt. 110.

<sup>2</sup> 12 Ind. 199.

<sup>3</sup> 24 Ind. 1; 1 Campb. N. P. 348.

<sup>4</sup> Chitty on Contracts, 735.

<sup>5</sup> Bishop v. Honey, 34 Tex. 245.

<sup>6</sup> *In re Cook & Gleason*, 3 Chic. Leg. N. 410.



the main building, the result sometimes of a proper prudence on the part of the owner, or of a more convenient occupation of the structure, or of caprice, that to determine which contribute to the erection is a matter of much perplexity. The decisions themselves will best illustrate the subject. A law which authorizes a lien in favor of mechanics "for work performed towards the erection, construction, or finishing of buildings," was held not to apply to the flagging of sidewalks, yards, and areas of buildings in the process of erection. Otherwise, if the law had been "buildings or appurtenances to any house."<sup>1</sup> In Iowa there is no lien on a lot for putting a sidewalk on the street in front of it under contract with the owner. The improvement is of a public rather than a private character, and it is not situated on the land of the contracting party.<sup>2</sup> So in Missouri a material-man cannot have a lien upon the lot and building thereon for material furnished for a sidewalk laid in the street adjoining the building, although the building has a basement with an area way excavated under the sidewalk to the outer line thereof. The fact that the sidewalk constitutes the roof of the area will not create the right to a lien, since such use is merely incidental, the public use being the primary one. It is a principle of law that a lien will not exist against property which cannot be taken into execution. Though part of the stone in the account is laid on the lot, there can be no lien therefor, since it is blended in the account with the other, and the lien therefor is waived or lost.<sup>3</sup> The court said that in *Pullis v. Hoffman*, 28 Mo. App. 666, a lien was given for "thick transparent glass, which is placed over areas under sidewalks, *for the purpose of lighting such areas*," really operating as a window in the cellar, not as a sidewalk. So if "mechanics and all persons performing labor or furnishing materials for the construction or repair of any building may have a lien," etc., making of a pavement in front of a lot is not in any sense either the construction or repair of a building.<sup>4</sup> So, where a lien is given "for erecting or repairing a building," etc., it does not extend to cases of altering, beautifying, or ornamenting a house, which does not need repairs from accident or decay.<sup>5</sup> Again, under the same statute, it does not extend to improvements of a farm, such as fencing.<sup>6</sup> Where a statute gives a lien for labor and materials furnished for the

<sup>1</sup> *McDermott v. Palmer*, 2 E. D. Smith (N. Y.), 675; s. c. 4 Seld. (N. Y.) 383; *Moran v. Chase*, 52 N. Y. 346.

<sup>2</sup> [*Coenen v. Staub*, 74 Iowa, 32.

<sup>3</sup> [*The Dugan Cut-Stone Co. v. Gray*, 43 Mo. App. 671.]

<sup>4</sup> *Knaube v. Kerchner*, 39 Ind. 217.

<sup>5</sup> *Bryan v. Whitford*, 66 Ill. 33.

<sup>6</sup> *Camsius v. Merrill*, 65 Ill. 67.

"building, altering, repairing, or ornamenting any house or other building or appurtenance thereto on such lot, or upon any street or alley and connected with such building," it does not comprehend curbing, grading, and paving the street in front of the same, though done under a contract with the owner of the lot.<sup>1</sup> A drain pipe extending from the cellar to the sewer in the street, and included in the contract for building the house, is a part of the house for which a lien may be maintained, and it is immaterial that the fee of the street is not in the owner of the house.<sup>2</sup> The builder of a windmill is entitled to a lien under the term "appurtenance."<sup>3</sup> Where a wall built around three sides of the stack of an iron furnace, at the distance of a few feet from it, in order to protect it from the possible sliding down of earth from a hill at the foot of which it stands, is not protected by a law which gives a lien for labor performed "in erecting, altering, or repairing, any building," such a wall cannot be deemed an essential or integral part of the furnace, necessary to its construction, and making a part of the building, like the wall of a cellar or the foundation-stones of a house. It was not connected with the furnace; it was only an appurtenance or appendage to it, enclosing a portion of the lot in which the furnace was erected, and rendering it less liable to encroachment and injury from the sliding of stones, earth, or wood from the side of the hill against which it was built. It is like an embankment or wall, unconnected with a building, but intended to protect it from being undermined by the falling over of earth adjacent to it, or by a stream of water which runs near it, and for which the above law would give no lien.<sup>4</sup>

§ 165. **What constitutes Erection and Repair.** — Under a law which gives the lien "for work done or materials furnished for or about the erection or construction of a building," when a contract is made to do all the brick and stone work about the erection of a building, including the laying of the pavement, it has been held that the pavement is included in the lien; but not so if the laying of the pavement be done under a separate contract from that of constructing the walls. Still, though the contract for constructing the building and laying the pavement be entire, if the building be finished, and the contract treated by the parties as complete, and a considerable time has elapsed before the

<sup>1</sup> *Smith v. Kennedy*, 89 Ill. 485.

<sup>2</sup> [*Beatty v. Parker*, 141 Mass. 523, 32 Neb. 19, 22-23.]

526.]

<sup>3</sup> [*Phelps & B. Windmill Co. v. Shay*,

<sup>4</sup> *Truesdell v. Gay*, 13 Gray (Mass.), 311.]

pavement is laid, and other rights have intervened, the claim filed after the statutory limitation has expired, from the date of the last work upon the building, will be too late. Whether the contract included the laying of the pavement, as well as the erection of the building, when contested and contradictory evidence is given, is a question for the jury.<sup>1</sup> Under the same statute it was decided in another case, that the question whether walls erected around basement windows of a building are necessary to its completion, is properly referred to the jury.<sup>2</sup> A mechanics' lien attaches for labor and materials expended upon sidewalks and fences, constructed under one entire contract for the erection of a building.<sup>3</sup> *Henry v. Plitt*, 84 Mo. 241, was for "sidewalks on the premises." Again, in another State it was said that the words, "work done on land in the erection or construction" of any building, are, as has been said, somewhat indefinite in their character; but a law which provides that "any person performing manual labor upon any land, timber, or lumber," shall be entitled to a lien, includes all labor done directly upon the land for the purpose of preparing it for use, and will include the making of fences on the land.<sup>4</sup> So it seems that work done and materials found, although not applied to the building itself in the strict sense of the term, is work done "toward the erection of the building," if embraced in the contract for the erection of the building.<sup>5</sup> If the sale of materials employed in the construction or alteration of a building is made by a written contract, which is silent as to the purpose for which the articles sold were intended to be used, parol evidence is admissible to show such purpose, and to establish thereby a mechanics' lien for the price in favor of the vendor, as it does not contradict or add any new term to the written contract.<sup>6</sup>

§ 166. **Erection and Construction.** — Where the lien law provides for cases only of "erection or construction," it has been generally held not to include mere "repairs." It is said that while hypercriticism upon words or phrases is not much favored by the law, yet the meaning of words — which are, in most cases, the true key to the intent of the law — must not be confounded. In the common understanding and language of the people, when

<sup>1</sup> *Yearsley v. Flanigen*, 22 Penn. St. 489.

<sup>4</sup> *Bailey v. Hull*, 11 Wis. 289.

<sup>2</sup> *Presbyterian Church v. Allison*, 10 Penn. St. 418.

<sup>5</sup> *Donaldson v. Wood*, 22 Wend. (N. Y.) 395.

<sup>3</sup> [*McDermott v. Claas*, 104 Mo. 14; *Henry v. Plitt*, 84 Mo. 237.]

<sup>6</sup> *Donahue v. Cromartie*, 21 Cal. 80.

the erection or construction of a house or building is spoken of, it is meant the erection of a new house or building, and not the repairing of an old one. And it must be presumed that such was the intent of the legislature, because it accords with what is the spirit, as well as with the words, of the act. If repairing an old house be within the act, where is the line of distinction to be drawn? Will making a new door or partition give the mechanic and material-man a lien on the whole building and lot? How much of the old house must be pulled down, and of what extent shall the repairs be? Or does the act include every material of repair? When the statute furnishes no indication of a criterion to judge these questions by, and where judicial discretion and experience would be at fault, the lien of the mechanic and material-man ought not to be extended beyond the terms of the statute. Hence, in a case where it was essentially, practically, and ornamentally remodelling and repairing an old house, the front wall was taken down to the cellar, and the roof taken off, except the rafters; but there stood the other walls, in exactly the same spot and on the same foundation. The front wall was modernized and deprived of its old-fashioned pent roof, the floors remaining the same, and a new back building was erected. It was simply a reparation, and not within the act.<sup>1</sup> This phraseology was held also in another case not to include remodelling or repairing, and therefore there was no lien for work done in the alteration of an old house; the walls remaining, though newly faced, and the interior modernized, the owner living in it while the work was going on.<sup>2</sup> So adding a basement to a house already finished so far as to receive the family, by lifting up of a frame so as to admit the new story underneath, is not an erection or construction.<sup>3</sup> Again, a back building, which is a mere accessory, no matter how enlarged, cannot be treated as a new building, so as to make it liable to the mechanics' lien cited above.<sup>4</sup> Materials were furnished towards certain additions and improvements made to a large hotel, — a two-story wing for a barber-shop was put up at one end, and an existing wing at the other end was somewhat enlarged, and a new roof was put on the entire building. The plaintiff's lumber went to all parts of the work, and his claim was filed against and included the whole building. An undisputed fact — which, the court remarked, seemed almost decisive — was that the building

<sup>1</sup> *In re Howett*, 10 Penn. St. 379.

<sup>3</sup> *Miller v. Oliver*, 8 Watts (Penn.),

<sup>2</sup> *Perigo v. Vanhorn*, 2 Miles (Penn.), 514.

359.

<sup>4</sup> *Harris v. Woolston*, 3 Phila. 376.

was occupied and the business carried on while the improvements were going on; and that if the lien in this case can be sustained, then every mechanic who puts on a new roof may have a lien.<sup>1</sup> So when a bath-house and kitchen are erected as a back building, and connected with the old structure so as to be but an addition, they are not within this law.<sup>2</sup> The following case arose under a statute which gave the lien only for "the erection and construction" of a building, and not for repairs or alterations. From a two-story frame dwelling, fifty-six feet front by twenty-six feet in depth, the roof was removed and a new one put on. Some of the weather-boards were taken off, a part of the building removed, the central part built up anew, and the ceilings, floors, studs, joists, and stairway were changed. It was held that while a building may be so entirely changed in plan, structure, size, and appearance, as to become in a fair sense, and according to common understanding, a new structure, yet facts may show, as in this case, that such construction is not within the above law.<sup>3</sup> So where "any person who furnishes labor or materials for building . . . shall have a lien therefor," etc., materials furnished for "repair" give no lien. In such cases the comparative amount of materials used is not important.<sup>4</sup> The same general proposition was decided in another State, that a law giving a lien for the "erection" of buildings does not extend to repairs.<sup>5</sup> And in another, where "no repairs or alterations" should subject the building to a lien, it was held that the converting a garret into bedrooms, for the purpose of increasing the number of rooms and accommodating the building to a boarding-house, or adding folding doors, was simply an alteration within the meaning of the statute; and a petition which alleges that materials were furnished for repairing, altering, erecting, and furnishing the building, without distinguishing how much were supplied for each, is defective.<sup>6</sup> A statute which gives a lien "for any work or labor upon any building, erection, or improvements upon land," it does not extend to labor performed in tearing down a building.<sup>7</sup> The statute does not afford a lien for simply tearing away a structure from land. But if such tearing away be a necessary part of the work required for the performance of the contract to remodel and repair, and so become a constituent of the intended improvement,

<sup>1</sup> *Smith v. Nelson*, 2 Phila. 113.

<sup>2</sup> *Rand v. Mann*, 3 Phila. 429.

<sup>3</sup> *Combs v. Lippincott*, 35 N. J. L. 481.

<sup>4</sup> *Homer v. Lady of the Ocean*, 70 Me.

<sup>5</sup> *Kirk v. Taliaferro*, 16 Miss. 754.

<sup>6</sup> *Whitenack v. Noe*, 3 Stock. (N. J.) 321.

<sup>7</sup> *Holzhour v. Meer*, 59 Mo. 434.

the right to a lien therefor clearly exists under the statute.<sup>1</sup> So where the lien is given for work and materials "furnished and actually used in the erection, alteration, or repair of any building," etc., no lien exists for labor performed in the removal of a building."<sup>2</sup>

§ 167. **Reparation, etc.** — When the lien given by law to the mechanic is for work done in "the erection" of a building, the question is whether, legally, the facts present in the particular case an erection of a building, or merely the repair of an old one, to which no lien is given. Repairs may be slight, or in some cases they may be very considerable, and carried to such an extent, as, in fact, to amount to the erection of a new building, different in its capacities and character from the old one. In extreme cases there can be no difficulty in determining in which class to rank it, either as merely repairing or restoring an old building to its original state, or as, in effect, constituting another building. Even a slight addition, manifestly subservient to the original edifice, might perhaps be merely a repair. But a substantial addition of material parts — a rebuilding upon another and larger scale — constitutes a new building, even though some portions of the old are preserved and incorporated in the new. Hence the addition of one story and a new building beside an old house, of equal dimensions, the whole being new-roofed and weather-boarded, with interior communications, constitutes a new erection.<sup>3</sup> Another test, under the same law, has been said to be whether the structure of a building is so completely changed that, in common parlance, it may be properly called a new building or a rebuilding; if so, it is an "erection" within the law. Thus, where every part of an old building is removed except the back wall and part of the side walls, and the openings in them are changed, altering the whole internal structure and external form of the building, and adding both to its length and height, this is an "erection and construction" within the law, although the parties in their contract call the work additions and alterations.<sup>4</sup> So where a building partly brick and partly frame, after undergoing repairs, was removed, and after its removal a cellar was dug under it and walled up, and a new chimney built, and the house newly weather-boarded and plastered, this is substantially a new building; the skeleton only of an old one, removed from its original site, entering into

<sup>1</sup> [Bruns v. Braun, 35 Mo. App. 338 ;  
see § 155.]

<sup>2</sup> Trask v. Searle, 121 Mass. 229.

<sup>3</sup> Driesbach v. Keller, 2 Penn. St. 77.

<sup>4</sup> Armstrong v. Ware, 20 Penn. St.  
519.

its composition. If new materials had been used in making the frame, although prepared off the lot the building was intended to stand upon, no one, from the circumstances, would have questioned the lien of the mechanics. And what difference can it make, if, instead of preparing a new frame for his house, a party purchase one ready made, and which had been erected on a former occasion and at a different place? None capable of producing the result. But, while this is so, partial repairs cannot, however, create a lien.<sup>1</sup> So, if the principal part of a building is torn down and rebuilt, this is a "construction." As where the gable end of a building is torn down, and a new building is erected adjoining on that side and opening thereto, the workmen employed have liens on the new building, but not on the old one.<sup>2</sup> In another case, the conversion of a large old building, formerly owned by one person, into six separate dwellings, by six different owners, by taking out all the old wood-work of the old storehouse, except the joists and roof, tearing down the whole of the front brick wall, running up brick division walls and brick front walls for each house, are so many separate erections within the meaning of the above law.<sup>3</sup> In Pennsylvania counties, where the act of May 1, 1861, is not in force, there is no lien for alterations and repairs, as patching walls, and putting on a new roof.<sup>4</sup> There must be such change of the exterior of a building as to constitute it a new building.<sup>5</sup> To erect a projecting structure of the dimensions of nine feet six by three feet nine from the second and third stories of the rear end of the old main building for bath rooms is too slight an alteration to change the old building into a new or different one, and hence does not give a mechanics' lien under the act of 1836. Such work is a repair, alteration, or addition, under the act of Aug. 1, 1868, and gives a lien only from the date of filing the claim.<sup>6</sup> Under a statute giving a lien for "repair of a building," a boiler situated in a building joined to a mill, and used to supply steam to the mill, is a part of the realty, and a lien can be maintained for repairs on the boiler.<sup>7</sup> Where the plaintiff contracted with Y., who was owner of premises in the city of New York upon which was a brewery, to erect on the premises a gas compressor, engine, oil

<sup>1</sup> *In re Burling's Estate*, 1 Ashm. (Penn.) 377.

<sup>2</sup> *Olympic Theatre*, 2 Browne (Penn.), 275.

<sup>3</sup> *In re Hill's Estate*, 2 Penn. L. J. 96.

<sup>4</sup> [*Long v. McLanahan*, 103 Pa. St. 537; *Hancock's Appeal*, 115 Pa. St. 1.]

<sup>5</sup> [*Dickson v. Hollister*, 123 Penn. 414, 420.]

<sup>6</sup> [*Leiper v. Hay*, 19 Phila. 362.]

<sup>7</sup> *Kelly v. Border City Mills*, 126 Mass. 148.

traps, and certain foundation plates to cap the stone foundation for the engine and compressor, and they were firmly annexed to the freehold, with the intention on the part of the owner that they should form a permanent accession to the brewery, it was held that the labor was performed and materials furnished in the alteration or repair of the building or appurtenances thereto, within the scope and meaning of the mechanic's lien law.<sup>1</sup> Whether a furnace and cistern, with pipes and other attachments, are furnished for erecting, altering, or repairing a house, and are affixed to it so that a lien attaches to secure their price, is a mixed question of law and fact, and its decision by a referee will not ordinarily be disturbed, unless it appears that he has misapplied the law.<sup>2</sup>

§ 168. **Additions.** — It is not necessary that the new building erected should be distinct from or independent of the older building.<sup>3</sup> A kitchen or back building is, therefore, an "erection," notwithstanding it adjoins and is connected with a house already built.<sup>4</sup> So a substantial addition of material parts, or rebuilding on another and larger scale constitutes a new building, although parts of the old are preserved and incorporated into the new.<sup>5</sup> So a new wing or addition to a building is an "erection" within the meaning of the law, though one wall of the new wing belonged to the old building.<sup>6</sup> Another case in Pennsylvania, where the lien is not given for repairs, stated that the authorities are marked by some diversities, yet when all summed up, they lead to the conclusion that repairs and alterations of a building which do not fairly change its exterior into a new structure are not "erections or constructions" within the lien law. It is the extent and character of the alterations, and not the change of purpose, which makes the difference between an old and a new building. Newness of structure in the main mass of the building — that entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have entered into it — is that which constitutes a new building as distinguished from one altered. It is but fair that the building should present to the eye that external change, indicating newness of structure, which is calculated to put purchasers, mortgagees, and other lien credi-

<sup>1</sup> [Watts-Campbell Co. v. Yuengling, 125 N. Y. 1.]

<sup>2</sup> [Kent v. Brown, 59 N. H. 236.]

<sup>3</sup> Nelson v. Campbell, 28 Penn. St. 322.  
156; affirmed in Lightfoot v. Krug, 35 Penn. St. 348.

<sup>4</sup> Pretz & Gausler's Appeal, Id. 349.

<sup>5</sup> Hershey v. Shenk, 58 Penn. St. 382.

<sup>6</sup> Harman v. Cummings, 43 Penn. St.



tors upon an inquiry for liens. A new roof to a building is clearly nothing but a repair. So the addition of a shed for a water-wheel makes no change in the mill itself. So where an old fulling-mill was transformed into a grist-mill, and a new lower floor, new roof, and new water-house were attached. There may be a lien for a new structure added to an old one, such as a kitchen or a side building. But the lien in such case is for a new structure.<sup>1</sup> Where additions made to an old building are substantial, for permanent purposes, and are so connected with the original structure as to make their connection as available, essential, and direct as if they had been built beside its walls, they are "additions of material parts," and a lien is secured for their payment under a law giving the lien against "every building."<sup>2</sup> Whenever any railroad company shall contract with any person for "the construction of its road, or any part thereof," etc., such law applies not merely when it is engaged in the construction of its first and main track, but also wherever it is enlarging its road by the addition of side tracks.<sup>3</sup>

§ 169. **Whether Erection, etc., is a Question of Law or Fact.**—To determine the question whether the claim of any mechanic or material-man constitutes legally a lien upon the property sought to be charged, involves the finding, primarily, of the facts of the case; and, secondly, the application of the law to them. Notwithstanding the general rule, that it is the duty of the jury to pass upon the former, and the court the latter, it has been the subject of discussion in some of the cases as to the respective province of these tribunals. Thus it was said, in one case, that where the structure of a building is so completely changed that, in common parlance, it may be properly called a new building or a rebuilding, it is clearly within the lien law; but this is sometimes difficult to decide, and then it must be left to the jury.<sup>4</sup> Subsequently another court, in commenting upon this language, stated that it did not consider the above case as having definitely repudiated the doctrine, that, whenever the facts are found or are undisputed, the question whether an alteration is of such a character as to constitute a new building is a matter of law for the court, and that, whether it is easy or difficult to decide. If this be not so, then it is plain that some of the mechanics who have furnished work and materials may lose, and others may gain, a verdict, according as different juries

<sup>1</sup> *Miller v. Hershey*, 59 Penn. St. 64.

<sup>2</sup> *Parrish & Hazard's Appeal*, 83 Penn.

111.

<sup>3</sup> *M. K. & T. R. v. Brown*, 14 Kan. 557.

<sup>4</sup> *Armstrong v. Ware*, 20 Penn. St. 519.

may form different opinions upon the same state of facts; and it is difficult to see how the court can so regulate the matter as to do equal justice to all claimants between the interfering verdicts of different juries. It would be a monstrous solecism if one of two mechanics equally meritorious should be decided to have a lien and the other not, and the ground be that the same building was considered to be in the one case within, and in the other without, the provisions of the same law.<sup>1</sup> So where the question was whether the work done constituted an "addition" or an "alteration," and the facts were clearly shown by the evidence, it was held to be a matter of law, upon which the court should have instructed the jury.<sup>2</sup> So, in an action to enforce a lien against a building for materials furnished to a contractor, when the fact of indebtedness by the owner to the contractor is found, the question of law arises whether by reason thereof the owner is liable to the material-man.<sup>3</sup> In a late case it was said, whether an improvement be an "erection or construction," and not repairs, is, perhaps, most frequently a mixed question of law and fact; and where the court has power to refer such questions to a commissioner who can deal with both, it is the most satisfactory way to dispose of it; and in such case, as he has power to inspect the premises attended by the parties and their counsel, his decision will not be reversed unless it clearly appears he was mistaken.<sup>4</sup> In Maryland it was held to be a question for a jury whether buildings are separate or not; also to determine what machinery is necessary to carry on a factory.<sup>5</sup>

*Buildings, etc. :—*

§ 170. **What are Buildings.**—Wherever a mechanics' lien law has been enacted it has universally applied to labor expended in the construction of "buildings." The term "building," as used in these laws, has been several times judicially defined. In one case it was said, although the definitions of a number of standard lexicographers include as buildings structures of various kinds which are not houses or designed for the habitation of either men or animals or sheltering of property, and although it cannot be denied that the words "build" and "building," as a verb and participle, are applicable to the erection of numerous structures which would not be included among any of the last-

<sup>1</sup> *Smith v. Nelson*, 2 Phila. 113; *Armstrong v. Ware*, 1 Phila. 213.

<sup>2</sup> *Udpike v. Skillman*, 3 Dutch. (N. J.) 131.

<sup>3</sup> *Smith v. Coe*, 29 N. Y. 666.

<sup>4</sup> *Yoh's Appeal*, 55 Penn. St. 121.

<sup>5</sup> *Okisko v. Matthews*, 3 Md. 168.

named classes, — thus, we speak of building bridges, building fences, sidewalks, embankments, etc., — yet, notwithstanding this, the word “building,” as a noun, has a common well-understood meaning, exclusive of structures of this character, and including those only which have a capacity to contain, and are designed for the habitation of, man or animals, or the sheltering of property. Things are built which are not called buildings after they are completed, as fences and sidewalks. So, when we state how many buildings there are on any farm or lot, or in any village or town, we are never understood to refer to fences, bridges, or anything of that sort, but only to those structures which have a capacity to contain, commonly included among buildings.<sup>1</sup> Again, the word “building” cannot be held to include every species of erection on land, such as fences, gates, or like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation, or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed,<sup>2</sup> etc. In still another case it was decided that it was evident the legislature did not use the term “building” in its broadest signification. It did not mean ships, and yet ships are built. They meant something in the nature of houses, as houses, mills, manufactories; buildings attached to and becoming part of the land itself.<sup>3</sup> A lien exists for lumber used in erecting a boiler house, filter-house, barrel-house, several tank-houses, pump-house, tool-house, etc., etc., the whole forming a plant known as an oil refinery. It was alleged that an oil refinery is not the subject of a lien; that it does not necessarily require buildings, and that the structures erected were not buildings, in the ordinary sense of the term, but were slight structures, without doors and windows, being little more than sheds. The Act of Assembly does not designate the character of the buildings to which a mechanics’ lien may attach. Of course, they must be sufficiently substantial to entitle them to the character of buildings. Nor are we embarrassed with the question whether buildings of any description are essential to an oil refinery. An engine and boiler, or any kind of a manufactory, do not absolutely require a building to protect them. Both may stand in the open air, yet no one doubts that if an engine and boiler-house are erected to

<sup>1</sup> *La Crosse & Mil. R.R. Co. v. Vanderpool*, 11 Wis. 119.

<sup>2</sup> *Truesdell v. Gay*, 13 Gray (Mass.), 311.

<sup>3</sup> *Coddington v. Dry Dock Co.*, 31 N. J. L. 477.

protect them from the weather, a lien will attach for labor or materials used in their construction.<sup>1</sup> And again, a lien filed against an oil refinery, and in sufficient form, is good, although the several structures constituting the refinery consist of appliances put up in the open air, and not inclosed or covered by any roof or shed.<sup>2</sup> Any structure of a substantial and permanent character, which may in any reasonable sense be known as a building, may be subjected to such lien.<sup>3</sup>

§ 171. **Instances of Structures considered as Buildings.** — A church is a "building" within the mechanics' lien law. All churches, it was said, are spoken of in common parlance as buildings; and as corporations, clerical as well as lay, ought to pay what they owe, there is no reason to suppose payment should not be enforced by this lien, which is as convenient as any other. Particularly where the congregation is not incorporated, this is the most facile way of making the property of the joint stock liable. There is no reason, either religious, moral, or civil, why the mechanics' lien does not apply to the erection of a church.<sup>4</sup> So a school-house is a "building" within this law;<sup>5</sup> and a shoe shop.<sup>6</sup> An ice-house, erected, not as an out-house or appurtenant to a man's residence, but as an independent and separate structure, for purposes of commerce, is such an "improvement" as is subject to the lien.<sup>7</sup> A stable built and occupied by a passenger railway company is a "building."<sup>8</sup> So is a steam railway depot building.<sup>9</sup> A chimney stack erected in a building used as a pork-house, for the joint purpose of the pork-house and generating steam and running machinery in a distillery attached thereto, and which could be used as a distillery only in connection with the pork-house, is a structure necessary to the main building; and a mechanic had a lien under a statute which gave "a lien on every building for the amount of debts contracted for its construction."<sup>10</sup> Where a statute was that a lien should exist for the construction or repair of "any building," etc., it comprehended a building with perpendicular walls and shingled roof, to be used as a floating, but stationary warehouse, and forwarding and commission house; the court observed that these words were very broad, and the only doubt as to

<sup>1</sup> [Short v. Miller, 120 Penn. 470, 475, 476.]

<sup>2</sup> [Titusville Iron Works v. Keystone Oil Co., 130 Pa. 211.]

<sup>3</sup> [Short v. Ames, 121 Penn. 530.]

<sup>4</sup> Presbyterian Church v. Allison, 10 Penn. St. 413.

<sup>5</sup> Shattel v. Woodward, 17 Ind. 225.

<sup>6</sup> Pratt v. Seavey, 41 Me. 370.

<sup>7</sup> Thomas v. Smith, 42 Penn. St. 68.

<sup>8</sup> McIlvain v. Hestonville & Mantua R. R. Co., 5 Phila. 13.

<sup>9</sup> Hill v. La Crosse & Mil. R. R. Co., 11 Wis. 214.

<sup>10</sup> Bodley v. Denmead, 1 W. Va. 249.

their application to such a case arose under a subsequent section that "when the claims of the parties entitled to recover shall be ascertained, the court shall render a decree for the amount of each claim against the owner of the building, and direct the house and interest of the employer in the *lot* to be sold." It was contended in argument that this language of the statute contemplated only such buildings as are erected on and permanently attached to the realty. In answer to this it was said, it is not doubted but that the mind of the legislature was primarily directed to such buildings; but this is no sufficient reason for saying that it was exclusively so. The present case was manifestly an exception, otherwise injustice might be done. If this statute did not give the lien, there was no law which did. The building, although not erected on the lot, was attached to it; and the employer had such an interest in it as might be sold on execution. The statute, being remedial, should receive such a construction as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. But a statute giving a lien "on boats" does not embrace such a building.<sup>1</sup>

§ 172. **What are not.**—On the other hand, the building of a railroad bridge does not come within a statute which gives a lien for work done or materials furnished in the erection or construction "of any dwelling-house or other building."<sup>2</sup> So, where a statute limits the structures on which parties can obtain a lien "to buildings and wharves," no lien can be had on bridges.<sup>3</sup> Under a provision that "every building hereafter erected or built shall be liable for the payment of any debt contracted, and owing to any person, for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building and on the land whereon it stands, including the lot or curtilage whereon the same is erected," a floating-dock is not a building within the meaning of this law, nor is a lot of land under tide-water a lot or curtilage. In order to subject a building to this lien law, it must have been erected upon the lot sought to be affected by the lien, and have remained there until the lien attached.<sup>4</sup> Where the language of a law is, "building, wharf, or other superstructure," a ditch is not a building or a wharf, and in no sense can it be designated a superstructure. Flumes constructed at different parts of the line of a ditch cannot change the general character of the work as an excavation. Such flumes

<sup>1</sup> Olmstead v. M'Nall, 7 Blackf. (Ind.) 387.

<sup>2</sup> Burt v. Washington, 3 Cal. 246.

<sup>3</sup> La Crosse & Mil. R. R. Co. v. Vanderpool, 11 Wis. 119.

<sup>4</sup> Coddington v. Dry Dock Co., 81 N. J. L. 477.

are mere connecting links of the ditch over ravines and gulches, and the whole work must be regarded as a ditch.<sup>1</sup> So, under a statute giving a lien upon "all and every dwelling-house or other building," fences are not included.<sup>2</sup> A coke-oven is not a building.<sup>3</sup>

§ 173. **Lien extended to other Erections.** — It is competent for the law-making power to give any definition it may please to the term "building," or to extend the lien so as to comprehend work and materials contributing to the construction of any class of structures. As where a law declares that "any addition erected to a former building, etc., shall be considered a building for the purposes of the act," etc., it is evident that the legislature meant, by the word "addition," to embrace something which in common parlance would not be designated as a building, or the phraseology would not have been used; that such additions should be considered a building for the purposes of the act; and therefore a piazza ten feet wide and seventy long is an "addition."<sup>4</sup> In another case under the same statute, it was decided that the addition must be a lateral addition on ground outside of the building to which it constitutes an addition. Adding to the height, extending the depth, or increasing the interior accommodations of a building, are alterations, not additions.<sup>5</sup> Where a law gives a lien for work done or materials furnished for the "construction" or "repairing" of a building, wharf, or "superstructure," it is not necessary to the establishment of a mechanics' lien, that the labor or materials shall be employed in the making or erection of a building. It is sufficient if they be employed in the alteration of a building to adapt it to other than the original uses, or to change its form or structure.<sup>6</sup>

§ 174. **Construction when Lien extends to other than Buildings.** — When the lien is extended so as to include labor upon other things than buildings, the courts will give to the law a reasonable construction. Thus, where a lien is provided "for all improvements erected by tenants," it is not to be applied to temporary and insignificant additions, but to such permanent and substantial additions as do essentially augment the interest which the tenant has in the land.<sup>7</sup> So where "the lien . . . shall attach to the buildings, erections, or improvements for which they were furnished or the work was done, in preference

<sup>1</sup> *Ellison v. Jackson Water Co.*, 12 Cal. 542.

<sup>2</sup> *Bank of Charleston v. Curtiss*, 18 Conn. 342.

<sup>3</sup> [*Central Trust Co. v. Cameron Iron & Coal Co.*, 47 Fed. R. 136.]

<sup>4</sup> *Whitenack v. Noe*, 3 Stock. (N. J.) 321.

<sup>5</sup> *Udike v. Skillman*, 3 Dutch. (N. J.) 131.

<sup>6</sup> *Donahue v. Cromartie*, 21 Cal. 80.

<sup>7</sup> *Thomas v. Smith*, 42 Penn. St. 68.

to any prior lien or encumbrance or mortgage, upon which said building, erections, or improvements have been erected or put. . . . and any person enforcing such lien may have such building sold on execution, and the purchaser may remove the same," there is an implied declaration herein that mortgages upon the buildings, erections, and improvements, "executed prior to the doing of the work or furnishing of the materials, shall be paramount to the lien;" and consequently that the term "improvements," as here used, does not mean an addition or betterment of a building, but some independent erection on the land. Any other interpretation would interfere with the prior rights of a mortgagee, and put it in the power of a mortgagor to ruin the security of his creditor, by making improvements to old houses covered by the mortgage, and then have them sold and removed from the land to pay the lien.<sup>1</sup> Again, if the lien be "extended to all improvements, engines, pumps, machinery, screens, and fixtures erected or put up by tenants of leased estates on land of others, . . . and to all mechanics, machinists, and material-men, doing work or furnishing the articles or materials therefor: provided that the lien hereby created shall extend only to the interest of the tenant or tenants, lessee or lessees therein, and to the improvements, engines, pumps, machinery, screens, and fixtures, erected, repaired, or put up by the mechanics, machinists, persons, or material-men entering liens thereon;" comprehensive as these words are, they do not include a railroad constructed by a lessee for mining coal in the slope of a mine, because of its temporary character. New slopes are common in coal-mines. As tenants progress in mining, they find modifications and changes of the interior arrangements convenient and necessary; and their erections, sometimes in one part of the mine and sometimes in another, are all comparatively temporary. A railroad placed upon the slope is as temporary as the use of the slope. A shaft may be sunk next year to the vein of coal which the slope was intended to reach, or a new slope substituted, or this one abandoned and the railroad transferred to some other part of the mine. Such changes are going on continually in coal-mines. In its nature then, it is a mere transient convenience; and an attempt to execute a lien against it would be attended with many embarrassments. Doubtless it might be called an improvement or fixture, if the statute was entitled to a liberal construction; but, conceiving it is not, the court will be disposed to stop where its words stop, and not push them beyond their indubita-

<sup>1</sup> Getchell v. Allen, 34 Iowa, 559.

ble meaning; and therefore spikes contributed to its building are not protected by a lien against the leasehold in behalf of the material-man.<sup>1</sup> A well is not an "improvement" that will give a lien for the labor of digging it.<sup>2</sup> Breaking up a prairie may be an improvement of land, but is not an "improvement upon land" within the statute of liens.<sup>3</sup> A coal mine is an "improvement."<sup>4</sup> So where the statute attaches a lien to the interest of the lessee in the leased premises, for "improvements" made upon the property by the tenant, and though it mentions "engines, boilers, fixtures," etc., when reference is had to the labor and property furnished, to secure which a lien is created, yet if they are omitted when naming the property to which the lien is to attach, and only the term "building" is used, they must be attached to and become part of the building as a freehold before a lien will attach for their erection. If they are such fixtures, etc., as could be removed by the tenant, they are not protected by a lien.<sup>5</sup>

§ 175. **Fixtures.**—The term "fixtures" has always been applied to articles of a personal nature which have been affixed to land; and questions respecting the right to them principally arise between landlord and tenant. Great latitude and indulgence are extended in respect to fixtures erected by the tenant for the purposes of trade. Several States have in later years extended the protection of the lien to the erection of fixtures by tenants, and making their interest in the premises responsible for the payment of the labor and materials expended on them. A purchaser at the sale enforcing the lien is, in such case, subrogated to all the original rights of the tenant. Where a lien was given upon "fixtures for manufacturing purposes," for their erection, the word was held to mean trade fixtures. These, as well as all other fixtures, must of course be annexed to the land, but do not become a part of it in legal contemplation, and are generally removable by the tenant during his term. If the structure be durable, and the annexation of as durable a character as the structure, the question whether fixture or not will depend but little upon the mode of annexation. Its fitness for the particular place where it is annexed, its being connected with the general business conducted there, and other facts going to show the intent of the party annexing to make one thing of

<sup>1</sup> Esterley's Appeal, 54 Penn. St. 192.

<sup>2</sup> [Guise v. Oliver, 51 Ark. 356, 358.]

<sup>3</sup> [Brown v. Wyman, 56 Iowa, 452.]

<sup>4</sup> [Central Trust Co. v. Coal I. & R. Co., 42 Fed. R. 106.]

<sup>5</sup> Collins v. Mott, 45 Mo. 100; Koenig v. Mueller, 39 Mo. 165.



the land and chattels to carry out one general purpose, should, perhaps, have more effect upon the question than the mode or the permanence of the annexation.<sup>1</sup> But under a law which conferred the lien only for materials used "in erecting, altering, or repairing a building," a stove with its funnel is not included. To come within this provision, the materials must be so applied as to constitute a part of the building, and not be merely a fixture for its more convenient use.<sup>2</sup> Tables or store counters not attached to the building are not the basis of a lien upon it.<sup>3</sup> A battery of boilers, imbedded in brick, stone, and mortar; a furnace chimney or stack, built on firm foundations, and extending up through the roof; the engines, cranes, wire mills, furnace trains, and other fixtures, firmly attached, all part of the realty, and all together constituting one plant, are part of the building, the alterations, additions, and repairs to which entitle the parties who furnished the material and labor therefor to a mechanics' lien.<sup>4</sup> In the construction of a building for a hotel, everything of a permanent character which will pass as a part of the freehold, and which is reasonably necessary to equip it for the purpose for which it is erected, is a part of such building, and therefore, comes within the mechanics' lien law. Heating, laundry, and cooking apparatus, including a large stock or soup-kettle, furnished as a part of the original construction of a hotel, as necessary for the use to which the building was to be applied, are subjects of a mechanics' lien.<sup>5</sup> Scenery, seats, and pulleys, put in a theatre, create a lien on the house and lot in favor of the mechanic and the furnisher.<sup>6</sup> The introduction of permanent machinery subjects the whole premises to a lien.<sup>7</sup> Bolting cloth which is made to form a part of the essential machinery of a flouring mill may, when placed in the mill, be a part of the freehold, and subject to a mechanics' lien.<sup>8</sup> A lien may attach to tanks and a sheet-iron floor placed in and attached to a factory with the intention of making them a permanent improvement where they are especially fitted and adapted to the transaction of the business conducted in such factory.<sup>9</sup>

<sup>1</sup> Coddington v. Beebe, 5 Dutch. (N. J.) 550; Robson's Appeal, 62 Penn. St. 405.

<sup>2</sup> [Lambard v. Pike, 33 Me. 141; [see § 159.]

<sup>3</sup> [Baum & Co. v. Covert, 62 Miss. 113.]

<sup>4</sup> [Appeal of Dickey *et al.*, 115 Penn. 73.]

<sup>5</sup> [Dimmick v. Cook & Co., 115 Penn. 573.]

<sup>6</sup> [Halley v. Alloway, 10 B. J. Lea,

523; Grewar v. Alloway, 3 Tenn. Ch. 584; see § 159.]

<sup>7</sup> [Pond M. T. Co. v. Robinson, 38 Minn. 272, 276; citing Phil. § 175; Hall v. St. Louis Manufacturing Co., 22 Mo. App. 33.]

<sup>8</sup> [Heidegger v. Atlantic Milling Co., 16 Mo. App. 327.]

<sup>9</sup> [O'Brien v. Hanson, 9 Mo. App. 545.]

## CHAPTER XV.

## BUILDINGS, ETC., SUBJECT TO LIEN.

§ 176. **When Lien attaches only to Real Estate.**<sup>1</sup>—The fundamental idea running through every mechanics' lien act is the equity of the mechanic to be paid for his labor and materials, by subjecting to a lien the identical structure he has contributed to bring into existence; the consequence is, that in presenting the authorities showing when the lien is given for labor and materials expended in the erection of buildings, the discussion of what buildings are made subject to the lien was, to some extent, anticipated; the determination of the former inquiry being always followed by a lien attaching to the building itself. The reader is therefore referred to the preceding chapter as well as the present for a complete review of the authorities on this branch of the subject. All the earlier acts secured the lien exclusively upon real estate. Later legislation has in several States extended the lien to chattels real and personal, and repealed the doctrine of the common law, so far as the mechanic is concerned, that all buildings become a part of the freehold so soon as they are annexed to land.<sup>2</sup> Illustrative of the proposition that the lien attaches only to real estate, it has been held, where the law declares the lien to be "on the building and lot of land on which it stands," to apply only to real estate.<sup>3</sup> So, where "the debt shall be a lien on such building and on the land whereon it stands, including the lot or curtilage whereon the same is erected," a mechanics' lien must attach to a fixture while it is land, and by virtue of its being land. If the owner remove it as a trade fixture before the lien attached, a materialman cannot fasten it on anybody else's land. He cannot attach his lien to the land, because the building is not there; nor to the building, because the land liable to the lien is not there. The lien, it is said, proceeds upon the principle of a right to

<sup>1</sup> [Cited in *Inverarity v. Stowell*, 10 Oreg. 261, 264.]

<sup>2</sup> *Illinois, Missouri, and others; Thomas v. Smith*, 42 Penn. 68.

<sup>3</sup> *Belding v. Cushing*, 1 Gray (Mass.), 576.

have a security on the estate of the owner of the building in the land, on account of the increased value given by the building to the land, and the natural injustice there is in the owner of the land appropriating to his use, without compensation, the toil and capital of others. It was not the intention to attach the lien to mere personal property. The whole object under this act is to prevent the owner of lands, whatever his estate in them, from getting the labor and capital of others without compensation. Consequently, as long as lumber lay in heaps on the land, it is not subject to the lien under this statute, nor is lumber, as such, ever subject to this lien. It is not until it has become part of the land, by being converted into realty.<sup>1</sup> So if the law be that "every building shall be subject to a lien," etc., and that "the lien of such debt shall extend to the ground covered by such building," etc., and that the lien "shall not be construed to extend to any other or greater estate in the ground on which any building may be erected than that of the person in possession at the time of commencing said building," etc., it applies only to real estate. Chattels personal, erected merely for the purposes of trade, and capable of being removed, are not subject to the lien.<sup>2</sup> The lien only attaches to such property and fixtures as form part of the realty.<sup>3</sup> Where a lien is given on the land and the structure, there can be no lien on the structure if there can be none on the land; as where the land is not owned by the one who builds the railroad or other structure.<sup>4</sup> A mechanics' lien cannot be maintained upon a building separate from any interest in the land upon which it is situated.<sup>5</sup> Again, a lien law provided that persons furnishing "any engine or other machinery for any mill . . . may have a lien upon any building, mill, . . . for which they have furnished materials, and on the interest of the owner of the lot on which it stands." No lien could be acquired upon specific articles furnished for a building, as distinct from the building, but only upon the building in which they were placed, or on the land whereon they were placed, or both.<sup>6</sup> So a wharf-boat attached to the soil, and appertaining to the realty, is subject to a mechanics' lien;<sup>7</sup> but a floating-dock is not.<sup>8</sup> Where a law, in giving a lien on railroads, confines it to the

<sup>1</sup> *Coddington v. Dry Dock Co.*, 31 N. J. L. 477. *ish Bath Co. v. Schettler*, 2 Washington, 457.]

<sup>2</sup> *Church v. Griffith*, 9 Penn. St. 117.

<sup>3</sup> *Haeussler v. Mo. Glass Co.*, 52 Mo. 452.

<sup>4</sup> [*Front St. Cable R. Co. v. Johnson*, 2 Wash. 112, 114; *Kellogg v. Littell, &c. M'fg Co.*, 1 Wash. 407; *Vendome Turk-*

<sup>5</sup> [*Kellogg v. Littell & Smyth M'fg Co.*, 1 Wash. 407.]

<sup>6</sup> *Baylies v. Sinex*, 21 Ind. 45.

<sup>7</sup> *Galbreath v. Davidson*, 25 Ark. 490.

<sup>8</sup> *Coddington v. Dry Dock Co.*, 31 N. J. L. 477.

"building, erection, or improvement," the rolling-stock does not constitute a part of its real estate, and the lien would not embrace it.<sup>1</sup> Rents of premises, accruing after the lien of a mortgagee has attached, and rightfully received by the administrator of the mortgagor, have been held, in Mississippi, subject to the lien.<sup>2</sup> And a receiver of rents and profits will sometimes be appointed when affidavits of inadequacy of security are filed, although no provision is specially made in the law for his appointment.<sup>3</sup> In the absence of special agreement no lien attaches to money in the hands of the owner of the property upon which the work was done.<sup>4</sup>

§ 177. **When Fixtures, etc., are liable.** — Fixtures, machinery, etc., when necessary to the original purposes of the structure, and erected with it, may become responsible to the lien, when they would not otherwise have been, without express enactment, if put up independently. As between the owner and mechanic, everything put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold; as wheels of a mill, the stones and even the bolting-cloth, a copper kettle or boiler in a brew-house, when proved to be essential to the brew-house, are subject to the mechanics' lien law.<sup>5</sup> So a cooking range,<sup>6</sup> and a cotton gin placed in a gin-house.<sup>7</sup> So the engine by which a steam saw-mill is propelled is part of the building.<sup>8</sup> Likewise mill-stones<sup>9</sup> and machinery put up for a mill, fastened by screws and bolts.<sup>10</sup> Electric poles, wires, lamps, etc., are fixtures and part of the realty. In the case of *Hutchins v. Masterson*, 46 Texas, 554, it is said: "The weight of the modern authorities establishes the doctrine that the true criterion for determining whether a chattel has become an immovable fixture consists in the united applications of the following tests: 1. Has there been a real or constructive annexation of the article in question to the realty? 2. Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected? 3. Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold, this intention being inferable from the nature of the

<sup>1</sup> *Neilson v. Iowa Eastern R. Co.*, 51 Iowa, 184.

<sup>2</sup> *Hoover v. Wheeler*, 23 Miss. 314.

<sup>3</sup> *Webb v. Van Zandt*, 16 Abb. Pr. 140. (N. Y.) 314.

<sup>4</sup> [*Myers v. Jacques*, 53 Conn. 517.]

<sup>5</sup> *Gray v. Holdship*, 17 Serg. & R. (Penn.) 413.

<sup>6</sup> *Reilly v. Hudson*, 62 Mo. 383.

<sup>7</sup> *Ewell on Fixtures*, 296.

<sup>8</sup> *Morgan v. Arthurs*, 3 Watts (Penn.),

<sup>9</sup> *Wademan v. Thorp*, 5 Watts (Penn.),

115.

<sup>10</sup> *McGreary v. Osborne*, 9 Cal. 119.

article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and purposes or use for which the annexation is made. And of these three tests pre-eminence is to be given to the question of intention to make the article a permanent accession to the freehold, while the others are chiefly of value as evidence as to this intention."<sup>1</sup> Heaters and ranges are fixtures. Whether a given article is a fixture or not depends on the intention, and that in general is judged mainly by the method of attachment and the use.<sup>2</sup> Under a statute that "every person performing labor upon, or furnishing materials to be used in the construction of, any building, shall have a lien upon the same," mirror-frames set in places left in the walls for that purpose, fastened by hooks and screws, so they could be removed, although their removal would have left unfinished walls, thus forming part of the walls, and designed by the owner to be permanent and to go with the building when sold, entitle the mechanic to a lien on the building.<sup>3</sup> But as between landlord and tenant, or rather a contest between the creditors of the latter, the claim to have the articles considered as personal property is received with latitude and indulgence. That which would otherwise be held as part of the realty, and inseparable from it, is treated, in favor of trade, as personalty, with all the incidents and liabilities of that species of property. And consequently, where an engine-house and other machinery are erected with the building, by a lessee, with the privilege of removing all the fixtures at the end of the term, and which are nothing more than a covering for the machinery extending into mines, they are personal property, and not subject to the lien.<sup>4</sup> So whatever is necessary to the enjoyment of the inheritance is subject to the lien, as a permanent stage in a theatre; but not the movable scenery and flying stages, as these are only necessary for the purposes of theatrical exhibitions, which, in this respect, must be considered as a species of trade, and are therefore trade fixtures, removable by the tenant.<sup>5</sup> A law provided that "every building or other improvement erected or materials furnished on leased lots or land shall be held for the debt contracted for, or on account of, the same," etc., and a tenant, with power of removal of fixtures, erected an engine and boilers; the lien did not attach to them; the term "improve-

<sup>1</sup> [Implement, &c. Co. v. Electric Light, &c. Co., 74 Tex. 605, 608.]

<sup>2</sup> [Schaper v. Bibb, 71 Md. 145, 149.]

<sup>3</sup> Ward v. Kilpatrick, 85 N. Y. 413.

<sup>4</sup> White's Appeal, 10 Penn. St. 252.

<sup>5</sup> Olympic Theatre, 2 Browne (Penn.) 275.

ment," as used in the act, was held to be synonymous with "building."<sup>1</sup>

§ 178. **When Machinery is liable.**—When the language of an act is "that every machine hereafter to be erected, constructed, or repaired, shall be subject to a lien, in like manner as buildings are made subject," the word "machine" applies only to fixed or stationary machinery, and not to movable machines. To extend the construction to the latter, it is thought, would be fraught with the most mischievous consequences. The word "machine," if to be taken in its most extended signification, means everything which acts by combination of the mechanical powers however simple or complex it may be. This broad sense would not only comprehend locomotives, threshing-machines, and such like; but all the various machines used in agriculture and commerce, carriages and vehicles in ordinary use, even watches and clocks, and all the machines in domestic use, would be alike embraced within the terms of the law. It cannot be supposed that the legislature designed to subject all these to the operation of the lien laws. Such things as mere chattels pass by delivery, and a construction which would embrace them within the provisions of the lien laws would interrupt the daily transactions of trade in such articles, and render the rights of property in them insecure. The statute should be construed according to the mischief to be remedied. In this case the mischief to be cured was that by the common law the mechanic who erects, constructs, or repairs fixed or stationary machinery, like him who builds a house, is without that safe security for compensation which a specific lien on the house or the machine would afford. But, with reference to movable machines, the common law affords ample and complete security to the mechanic, by leaving in him the right of property, or in the case of repairs done, giving him a lien thereon while they remain in possession.<sup>2</sup> Where a verbal lease existed for five years, which was valid by reason of possession, a mechanics' lien will attach for the purchase-money of the machinery of a mill as against subsequent encumbrances, under a law which provides for a lien for "machinery for any building, erection, or other improvement."<sup>3</sup>

§ 178 a. **Buildings, etc., must be described in Statute.**—Inasmuch as this lien is strictly statutory, the class of property subject to it must be designated therein. Thus, where a lien

<sup>1</sup> Collins v. Mott, 45 Mo. 100.

<sup>3</sup> Nordyke v. Hawkeye, 53 Iowa, 524 ;

<sup>2</sup> New England Car Spring Co. v. Balt. [see § 162.]  
& Ohio R. R., 11 Md. 81.

was given on "any house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure," it was held not to authorize a lien upon a railroad.<sup>1</sup> It was held, where a State constitution required the legislature to pass laws to protect "laborers on railroads, and in another section declared that "mechanics, artisans, and material-men of every class shall have a lien upon the building and articles made or repaired by them," that under neither was a mechanic given a lien on a railroad.<sup>2</sup> Where laborers are given a lien for labor such as "ditching, building levees," etc., it was held that, as a railroad is neither a drain nor a levee, it was not subject to their lien.<sup>3</sup> Where a lien is given against a "manufactory," a company furnishing water through pipes does not come within that definition, and therefore there is no lien for pipes furnished such company.<sup>4</sup> Under a law extending the lien to "plumbing, gas fitting," it was held that gas fixtures, as distinguished from gas fittings, were not the subject of the lien.<sup>5</sup> "Swings and seats" in a dancing-hall are not "buildings or structures."<sup>6</sup> Where a lien law gave a lien on buildings in "cities and towns," it did not extend to the country.<sup>7</sup> Where a law mentions "wharves, piers, bulkheads, and bridges, and other structures connected therewith," it includes all structures connected with a wharf, and necessary for its use, and "sheds" erected upon piers are included in that term.<sup>8</sup>

§ 179. **Public Buildings exempt.** — A building which would otherwise be subject to the lien may be exempt on grounds of public policy. In considering the question of lien, the authorities say, the whole of the remedy, including the right to issue execution, must be considered in order to determine whether it is the proper remedy in any given case. Not to do so would be too abstract and impracticable; for the lien abstractly is nothing, its consequences or results everything. The question of lien, therefore, must be regarded with reference to the legal consequences of it; and, if they would necessarily contravene settled principles, it is evident that such an effect should not be given, and was not intended by the law; and, if it be incapable of the practical results assigned by law to it, it is inoperative,

<sup>1</sup> *Rutherford v. Railroad Co.*, 35 Ohio, 559.

<sup>2</sup> *Tyler Tap R. Co. v. Driscoll*, 52 Tex. 13.

<sup>3</sup> *Taylor v. Hathaway*, 27 Ark. 601.

<sup>4</sup> *Kentucky v. New Albany*, 62 Ind. 61.

<sup>5</sup> *Jarecki v. Philharmonic Society*, 79 Penn. 403.

<sup>6</sup> *Lothian v. Wood*, 55 Cal. 159.

<sup>7</sup> *Hendricks v. Fields*, 26 Gratt. (Va.) 447.

<sup>8</sup> *Collins v. Drew*, 67 N. Y. 149.

and there is no lien.<sup>1</sup> Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself that property of this description was meant to be included; and, to warrant this inference, something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions. Therefore, under an ordinary statute, a lien cannot be acquired for work done or materials furnished towards the erection of a public school-house erected in accordance with public law.<sup>2</sup> The same as to a public school-house in Pennsylvania.<sup>3</sup> In Iowa it cannot be enforced against the public school-house of a township.<sup>4</sup> In Illinois it is said that the lien does not attach on ground of public policy to a building held for public school purposes, built by the State officials.<sup>5</sup> In another case it was said, it cannot be supposed that the legislature could intend, in any case, to subject a county to the privation or loss of its buildings, such as court-houses, public offices, or jails, so indispensably necessary for the public benefit and accommodation, as also for the preservation of the public records containing the only evidence that thousands may have for their rights, and in which every individual of the community has a deep interest; and, as the result, there cannot be a recovery against a county upon a mechanics' lien filed for materials furnished for the erection of such public buildings.<sup>6</sup> Though in another case it seems to have been assumed that a public school-house built by a township trustee was a building liable to the lien law.<sup>7</sup> So in California a mechanics' lien cannot be acquired against a public building.<sup>8</sup> On public buildings there is no lien. Unless the statute expressly and explicitly provides

<sup>1</sup> *Foster v. Fowler*, 60 Penn. St. 27.

*Brickkerhoff v. Board of Education*, 37 How. Pr. (N. Y.) 520.

<sup>2</sup> *Williams v. Controllers*, 18 Penn. St. 275.

<sup>3</sup> *Charnock v. Colfax*, 51 Iowa, 70.

<sup>4</sup> *Board of Education v. Neidenberger*, 78 Ill. 58.

<sup>5</sup> *Wilson v. Commissioners*, 7 Watts & S. (Penn.) 197; *Poillon v. Mayor of New York*, 47 N. Y. 666.

<sup>6</sup> *Shattel v. Woodward*, 17 Ind. 225.

<sup>7</sup> *Bates v. Santa Barbara Co.*, 90 Cal. 543, 546, citing *Phillips*, § 179; *Mayhofer v. Board of Ed.*, 89 Cal. 110 (school-house); *State v. Tiedermann*, 10 Fed. Rep. 20;

*Jordan v. Board of Ed.*, 39 Minn. 298, citing Phil. § 179; see note by Robertson Howard, 25 Fed. Rep. 175; *Platteville v. Bell*, 66 Wis. 326; *Supervisors v. Gillen*, 59 Miss. 198, 200 (county buildings). Public policy forbids a lien on public property. *Board, &c. v. O'Connor*, 86 Ind. 531; *Secrist v. Board, &c.*, 100 Ind. 59, 60; *Fatout v. Board*, 102 Ind. 224, 232 (no lien for work in public schoolhouse declaring *Shattel v. Woodward*, 17 Ind. 225 overruled). A public square and county court house are exempt from mechanics' liens, on grounds of public policy. *Board, &c. v. O'Connor*, 86 Ind. 531, 536, citing Phil. § 179.]



otherwise they are by implication exempt.<sup>1</sup> On grounds of public policy, in the absence of a provision to the effect that a mechanics' lien may be acquired or enforced against public property held for public use, such a lien can neither be acquired nor enforced against such property.<sup>2</sup> If O., occupying government land under the homestead act, but not entitled to a patent, engages B. to build a house on the land, fixing it to the soil, B. has no lien either on the land or the house.<sup>3</sup> A monument erected in a municipal park and affixed to the land becomes municipal property, and, although built by private contribution, cannot be made the subject of a lien for work and materials.<sup>4</sup> There is no lien on a county bridge for labor or materials.<sup>5</sup> A mechanics' lien cannot be enforced against the property of a county, nor can the processes of the lien law be used to subject the indebtedness of a county to a contractor to the payment of a debt he owes a sub-contractor.<sup>6</sup> If the county does not defend against a lien claimed on its property, the contractor cannot appeal from the judgment.<sup>7</sup> There is no lien for machinery furnished for city water-works.<sup>8</sup> The New York law, however, gives a lien for service under contract with a city upon moneys in the control of the city due or to be due under the contract.<sup>9</sup> The lienors will be subrogated to the contractors' rights against the city.<sup>10</sup> An ordinance of a city that contracts for city work shall contain a clause reserving the last instalment until proof

<sup>1</sup> [Knapp v. Swaney, 56 Mich. 345, 347.]

<sup>2</sup> [Portland Lumbering & M'fg Co. v. School District No. 1, 13 Oreg. 283, citing Phil. § 179; Board, &c. v. O'Connor, 86 Ind. 536; Leonard v. City of Brooklyn, 71 N. Y. 498; Darlington v. Mayor, &c., 31 N. Y. 164; City of Chicago v. Hasley, 25 Ill. 595; Foster v. Fowler, 60 Pa. St. 27; Loring v. Small, 50 Iowa, 271; Bouton v. McDonough Co., 84 Ill. 384; Wilson v. Huntington Co., 7 Watts & S. 197; Ripley v. Gage Co., 3 Neb. 397; Pike Co. v. Norrington, 82 Ind. 190; Lowe v. Board of Commissioners of Howard Co., 91 Id. 553; Dunn v. North Missouri R. R. Co., 24 Mo. 493; McPheeters v. Merrimac Bridge Co., 28 Id. 465; Poillon v. Mayor of New York, 47 N. Y. 666; Board of Education v. Neidenberger, 78 Ill. 58; Thomas v. Board of Education, 71 Id. 283; Quinn v. Allen, 85 Id. 39; Charnock v. Colfax T'p, 51 Iowa, 70; Fatout v. Board of Commissioners, 1 N. E. Rep. 389. In support of the position that a lien can be enforced against such a building, the counsel for the plaintiff has cited two

authorities: Morse v. School District, No. 7, Newbury, 3 Allen, 307; and Shattell v. Woodward, 17 Ind. 225. In reply to this, it is sufficient to say that in the State in which the first case was decided, there was no statute exempting such property from execution, Gaskill v. Dudley, 6 Met. 546, and in the last it has been overruled by a later authority already cited. Lumbering, &c. Co. v. School District, 13 Oreg. 283, 284, 285, 286.]

<sup>3</sup> [Kansas, L. Co. v. Jones, 32 Kan. 195; U. S. Rev. Stats. 1878, § 2296.]

<sup>4</sup> [Griffith v. Happersberger, 86 Cal. 606, 613.]

<sup>5</sup> [Board of Commissioners v. Norrington, 82 Ind. 190, 196.]

<sup>6</sup> [Breneman v. Harvey, 70 Iowa, 479.]

<sup>7</sup> [Loonie v. Burt, 80 Tex. 582.]

<sup>8</sup> [Wilkinson v. Hoffman, 61 Wis. 637, 639.]

<sup>9</sup> [Bell v. Mayor, &c., 105 N. Y. 139 (contract with school trustees for building a school house is within the law); Mayor, &c. v. Crawford, 111 N. Y. 638.]

<sup>10</sup> [Mayor, &c. v. Crawford, 111 N. Y. 638.]

of payment of all claims of which notice is given within ten days after completion of the contract, is a sort of mechanics' lien law, and creates an obligation upon the city that will be enforced by the courts. It holds the balance as trustee for the said claimants.<sup>1</sup> So in California a material-man or laborer may give notice to the county or city that owns the building, and said owner will be bound to retain unpaid contract money for the subcontractor's benefit.<sup>2</sup> The builder of a parish jail under contract with the parish authorities can maintain a lien on the building, though not on the land which had been donated for a jail lot, whereby it was dedicated to public uses, and not subject to parish debts.<sup>3</sup>

§ 179 *a*. **Continued.** — The conclusion deducible from the cases is this: that in those States, where, upon a general judgment no execution can be levied upon public property of a municipal corporation, no execution to enforce a mechanics' lien claim can be levied upon similar property.<sup>4</sup> The following cases have been decided: Mechanics' lien laws are framed with reference to such property as is subject to be sold under execution. Where property, as a public court-house, is exempted by law from sale on execution, the lien is not enforceable against it.<sup>5</sup> Where public property is exempt from execution, bridges constructed by a county are not subject to a mechanics' lien.<sup>6</sup> So a building owned by a county and used for county purposes.<sup>7</sup> It will not lie against a court-house or other public property exempt from execution.<sup>8</sup> Where no execution can issue against a county, there is no lien against public buildings of a county.<sup>9</sup> Where a remedy is provided by statute for the collection of judgments on debts created by public functionaries, a mechanics' lien against a public school-house is impliedly prohibited and cannot be enforced. The special remedy provided by statute must be resorted to.<sup>10</sup> But this exemption will not defeat an action brought by a subcontractor against the owner to recover what may be due the original contractor.<sup>11</sup>

§ 180. **Property of Public and Private Corporations.** — This exemption from execution has been held in some States not to

<sup>1</sup> [Mer. & Tr. Bk. v. Mayor, &c., 97 N. Y. 355.]

<sup>2</sup> [Bates v. Santa Barbara Co., 90 Cal. 543, 546.]

<sup>3</sup> [McKnight v. Parish of Grant, 30 La. An. 361.]

<sup>4</sup> Frank v. Chosen Freeholders, 39 N. J. L. 347.

<sup>5</sup> Bouton v. McDonough Co., 84 Ill. 396.

<sup>6</sup> Loring v. Small, 50 Iowa, 271.

<sup>7</sup> Lewis v. Chicksaw Co., Id. 235.

<sup>8</sup> Whiting v. Story Co., 54 Iowa, 81.

<sup>9</sup> Ripley v. Gage Co., 3 Neb. 397.

<sup>10</sup> Thomas v. Board of Education, 71 Ill. 283.

<sup>11</sup> Frank v. Chosen Freeholders, 39 N. J. L. 347.

be confined to municipal corporations. Corporations (other than municipal, which are purely public) are divided into public and private corporations; that is, into those that are agencies of the public, directly affecting it, and those which only affect it indirectly, by adding to its prosperity in developing its natural resources, or in improving its mental or moral qualities. Of the former are corporations for the building of bridges, turnpike roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. In some States it is well settled that this use is not to be disturbed by the seizure by creditors of any of their property essential to their active operations. This direct benefit to and accommodation of the public very clearly distinguish this class of corporations from the second; viz., private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing or coal and iron companies, etc., or libraries, literary societies, schools, and the like. Whether they progress or cease the public is not directly affected; and hence liens are enforceable against them without, as a general thing, any regard to the effect upon their operations. But a corporation for introducing water into a town for the accommodation of its inhabitants is a public corporation, and its buildings, etc., necessary for carrying on its operations, are not subject to this lien.<sup>1</sup> The question whether a *quasi* public institution, like a water company, can have its functions interfered with by sale at a material-man's suit of any part of the company's property necessary to its service of the public, was raised in Alabama, but not decided.<sup>2</sup> Although railroad companies in some respects resemble private corporations, yet, as they are organized for the public benefit, the State takes a deep interest in them and regards them as matters of public concern. They are looked upon by the laws as corporations endowed with capacities for the promotion of the public good, and for the diffusion of advantages to the State as a body politic. And where the constitution of a State requires that "internal improvements shall be forever encouraged by the government of the State," it is her right and duty to advance the commerce and promote the welfare by making or causing them to be made. After a State has assumed an immense responsibility in building

<sup>1</sup> *Foster v. Fowler*, 60 Penn. St. 27.      & Steel Co., 89 Ala. 552, 560, citing *Commissioners v. Tommey*, 115 U. S. 122.]

<sup>2</sup> [*Eufaula Water Co. v. Addyston Pipe*

a railroad for the public use and convenience, it would be unreasonable to suppose a power remained in any individual to deprive the public of the benefit contemplated by it. A lien, with a power of enforcing it by execution, would enable the lien-holder to subject the portion of the road affected by it to public sale; and the execution, to be effectual, must confer a title to a purchaser under it. It is said that it is better to suffer a mischief which is peculiar to one than an inconvenience which may prejudice many. This, however, is no mischief to the mechanic. He would subject the public to this great inconvenience, not because the public is in debt to him, not because he has not the same remedy for his debt that every other member of the community has, but that he may enjoy a privilege conferred on no other class in society. Therefore where work and labor are performed upon or materials furnished for the line of a public railroad, built under authority of the State for public use, and by it contributed to, it is protected from the mechanics' lien.<sup>1</sup> The Arkansas act of 1887 gives a lien to one who furnishes materials to build any railroad, whether incorporated or not.<sup>2</sup> Property held by a municipal corporation for specific public uses is held in trust for government purposes, and cannot be taken by an individual for the satisfaction of his private claim under color of general laws intended to secure the application of the property of a debtor to the satisfaction of the claims of creditors. Accordingly a "fire-bell tower" of a corporate city was exempt.<sup>3</sup> No lien attaches for pipe furnished a private water company supplying a city.<sup>4</sup> Where a lien law declares that "any person who shall by contract . . . with the owner of any lot of land," furnish materials, etc., it applies exclusively to individuals and private corporations, and does not apply to buildings belonging to the State, or the general or local public, or even where the property of the State is held in trust and is being improved under the direction of the State, as where an Industrial University, a State institution, is managed by a board of trustees, and that, although they may sue and be sued. But if the property is held in part by private individuals and another part by the State, the rule would be different. For where the State enters

<sup>1</sup> *Dunn v. North Mo. R. R.*, 24 Mo. 493. But no opinion was expressed on the question whether, independently of statutory authority like the foregoing, a railroad built for public use could be sold under execution.

<sup>2</sup> [*Brown v. Buck*, 54 Ark. 453.]

<sup>3</sup> *Leonard v. Reynolds*, 14 Supreme Ct. (N. Y.) 73.

<sup>4</sup> [*M'Neal Pipe & F. Co. v. Bullock*, 38 Fed. R. 565. Court said it was a quasi-public company and exempt, citing Phil. § 180.]

into trade or business with private individuals associated together in a corporate capacity, such organization may be subjected to all the legal remedies which apply to private corporations.<sup>1</sup> Under a law giving the lien on any "building or other structure," it was held, on grounds of public policy, that the legislature could not have intended to have embraced "bridges, culverts, trestles, etc.," of a railroad.<sup>2</sup> A law giving to mechanics and laborers a lien on buildings, including the lot or ground upon which they stand, or a lien upon a lot or farm or vessel, "or any kind of property not herein enumerated," for work done thereon or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company, that may be essential in the operation and maintenance of its road, on grounds of public policy, because such railroads, although constructed for private emolument, are highways, established for the convenience and benefit of the public, unless the words of the statute clearly require it to be done.<sup>3</sup> Nor will a statute which declares "that all debts and contracts of any corporation, prior to or at the time of the execution of any mortgage or deed of trust by such corporation, shall have a first lien upon the property, rights, and franchises of said corporation," etc., secure a mechanic a lien for his labor for work done on the construction of a railroad. The language in such case is fully satisfied by restricting its operation to merely private corporations, which may be formed by three or more persons. If it was extended to such *quasi* public enterprises as railroads, it might defeat the express power given to such corporations to raise money upon bonds to be secured by mortgage upon their property.<sup>4</sup> It has, however, been held that the general phrase in the Oregon act of 1885, "any other structure," following, as it does, a specific enumeration of works declared to be subject to a lien for labor and materials furnished for their construction, such as a "building," "ditch," "flume," and "tunnel," includes a railway.<sup>5</sup> And again it has been affirmed that there is no public policy against the enforcement of a lien on a railroad.<sup>6</sup> A statute giving a lien for labor, etc., in constructing "any bridge," gives a lien

<sup>1</sup> Thomas v. Industrial University, 71 Ill. 312.

<sup>2</sup> Graham v. Mt. Serling, 14 Bush, 425; Abercrombie v. Ely, 60 Mo. 23.

<sup>3</sup> [Buncombe Co. Commissioners v. Tommey, 115 U. S. R. 122.]

<sup>4</sup> [Buncombe Co. Commissioners v. Tommey, 115 U. S. R. 122.]

<sup>5</sup> [Giant Powder Co. v. Oregon Pac. Ry. Co. *et al.*, 42 Fed. R. 470.]

<sup>6</sup> [Purtell v. Chicago F. & B. Co., 74 Wis. 132, 135.]

on a railroad bridge.<sup>1</sup> This decision was made after exhaustive argument, though one not versed in the mysteries of the region lying beyond the kingdom of common sense would find it difficult to discover room for argument; a railroad bridge is private property, and the mechanic has as much need of a lien as in case of any other bridge, and public travel need not be interfered with at all in the enforcement of the lien. It is no defence that part of a railroad lies outside of the State. The lien will be declared on the part within the State.<sup>2</sup> Public bridges are not subject to the mechanics' lien law which secures liens on "bridges" for work done thereon, or for materials furnished for their construction. A public bridge is a common highway. A private bridge is similar in its nature to a private right of way, and is subject to most of its incidents. The character of a bridge depends more upon the use that is made of it than upon the means by which it was erected. If individuals make a public highway, the mode of remuneration authorized, as the right to take toll, will not deprive it of the character stamped upon it by the purposes to which it is applied. The right to erect a bridge, and to exact toll from passengers crossing it, is a franchise that can be granted only by the State. That right is personal, and cannot be transferred without express authority of law. In conferring the privilege, regard is had to the ability of the applicant to build and keep up the bridge; and as personal considerations may influence the grant, the franchise of common right is not transferable. The right of transfer in a corporation is confined solely to property. This construction does not render the act nugatory; because bridges which are public highways cannot be subjected to the liens of mechanics, it does not follow that there may not be private bridges which will be subject to them.<sup>3</sup> So, in accordance with these views, a normal university, not the property of the State, is subject to a mechanics' lien.<sup>4</sup> But where a reform-school, although an incorporation, was subject to visitation by the legislature, it was held a public institution, and, as such, not subject to mechanics' liens.<sup>5</sup> The decision of the United States Supreme Court in *Munn v. Illinois*, 4 Otto, 113, that when the owner of a warehouse devotes it to a public use,

<sup>1</sup> [Smith Bridge Co. v. Bowman, 41 Oh. St. 37, 52; Purcell v. Chicago F. & B. Co., 74 Wis. 132.]

<sup>2</sup> [Ireland v. A. T. & S. F. R. Co., 79 Mo. 572; see § 202.]

<sup>3</sup> [McPheeters v. Merrimac Bridge Co., 28 Mo. 465.]

<sup>4</sup> Board of Education v. Greenebaum, 39 Ill. 610.

<sup>5</sup> Patterson v. Penn. Reform School, 92 Penn. 229.

he gives the public an interest in it, and must to the extent of that interest submit to public control for the common good, does not make private property publicly used, public in any such sense as to exempt it from mechanics' liens.<sup>1</sup>

§ 181. **Canals, Toll-houses, etc.** — The decisions of many States undoubtedly establish that, as the interest of the public in the administration of a public franchise survives the grant by which it is made the property of the corporation or an individual, and is paramount to the right of the creditors of the grantees, it cannot be taken in execution and sold for the payment of debts. This is true, not only of the franchise itself, as, for instance, of the right to carry passengers or freight on a railroad, but of everything necessary to its enjoyment, and without which it cannot be exercised. The exception thus made in favor of the possessors of franchises of this description is, however, in derogation of the general rules of law, and should not be carried further than the necessity, in which it has its origin, requires. To sell the cars or locomotive of a railway to the highest bidder is at once and necessarily to stop the working of the road; and the same result must necessarily follow, though indirectly, from the sale of the toll-houses of a canal, because tolls cannot be collected without the necessary means, nor the canal kept in repair without the collection of tolls. But it has been decided that a stable built and occupied by a passenger railway company is liable to a mechanics' lien; for it cannot be said to be absolutely requisite that the stabling owned by the passenger railroads which traverse our great cities should be exempt, because although their cars are propelled by horses, and horses cannot be kept without proper buildings to keep them in, still those buildings may be rented, and not owned by the company. And, although it may be more convenient to have the stable at the point which the company select as the terminus than elsewhere, yet any other point on or near the route will do nearly as well; this cannot be said with regard to a toll-house, which must usually be placed at a particular spot, or the sale of the cars or locomotive of a railway to the highest bidder, which would at once and necessarily stop the working of the road.<sup>2</sup>

§ 182. **Depots, etc.** — This claim of exemption on behalf of public corporations has not, however, been universally received. As applicable to the mechanics' lien law, where it was contended that depot buildings of a railroad company are not liable to the

<sup>1</sup> [Girard Point Storage Co. v. Southwark Foundry Co., 105 Pa. St. 248; 16 Phil. 193.]      <sup>2</sup> McIlvain v. The Hestonville & Man-tua R. R. Co., 5 Phila. 13.

lien, it has been forcibly said: This position is urged upon grounds of public policy, that the public are interested in preserving railroads in an operative condition, and that if these liens be allowed to attach to their buildings, or creditors allowed to levy upon and sell their cars, or other personal property necessary to the operation of the road, they will be rendered incapable of subserving the public interest; and several cases are referred to, in which it has been held that judgment creditors could not levy on and sell the cars, or any other personal property of the company, necessary for the operation of the road, upon the ground that the railroad must be considered as an entire thing, and public policy requires that these articles should not be severed from it. But whatever merit there may be in this doctrine, it cannot have an unlimited application. On the contrary, it cannot be applied at all, except so far as property has become entirely the property of the corporation, divested of all specific liens. When that has been done, if there be any reason for saying that a general creditor must take all or nothing, that is one thing; but it is an entirely different thing to say, when the corporation by the very act of acquiring a particular portion of property, either by contract or by the force of law, creates a specific lien in favor of the vendor or manufacturer, or would create it unless hindered by public policy, that such lien shall not attach for that reason. Suppose a company furnishes materials to a manufacturer of cars or engines, and contracts with him to build them, and he does so on his own premises; the company takes possession, without paying for his labor, and he replevies them; would the doctrine referred to in regard to a levy upon cars, after they have once become fully the property of the company, be applicable there? Could the company say, the railroad with all its cars, etc., was an entire thing, and therefore the mechanics' lien did not attach? It seems obvious that the doctrine cannot support such a conclusion. So, if a railroad company purchase land for a depot building, and at the same time execute a mortgage to secure the purchase-money, there can be no conceivable reasons of public policy that should prevent the enforcement of such specific lien, by means of which the company had acquired the very property itself. And there is no distinction in principle in allowing such a lien to be created by a mortgage of the company, and allowing it to be done by force of this statute. A building built for a railroad company is as clearly within the letter and spirit of the statute as any other building. The object was to furnish a protection to those who



expended their labor and materials in improving the property of others; and there is nothing in public policy that requires or should permit railroads to be built at the expense of defeating this object. Although railroads, like many other improvements, are of great public interest and importance, yet sound policy does not require them to be built any faster than can be done consistently with justice and the preservation of private rights.<sup>1</sup> So, where a statute declares that "every building" shall be subject to the lien of the mechanic, it was held to apply to the depots of a railroad company, and that no public policy exempted them on the grounds that the corporation was performing a public service.<sup>2</sup>

§ 183. **Houses of Foreign Ministers.**—The general rule of the common law as to real or immovable property is, that the laws of the place where such property is situate govern, in respect to the rights of the parties, the modes of transfer and the solemnities which should accompany them. "Let us conclude therefore," says Vattel,<sup>3</sup> "that the immovable property of a foreign minister does not change its nature in consequence of the character conferred on its owner, but continues subject to the jurisdiction of the State in which it lies." All contests and lawsuits concerning that property are to be carried on before the tribunals of the country where the property is situate; and those tribunals may decree its seizure in order to satisfy any legal claim. If, however, the ambassador live in a house of his own, that house is excepted from the rule, as actually serving for his immediate use; that is, excepted in whatever may affect the present use which the ambassador makes of it.<sup>4</sup> Therefore, if the house against which a mechanics' lien be sought to be enforced is erected by a minister plenipotentiary for his residence, it cannot be sold; and, when exemption is claimed, such facts must appear by proof that he is entitled to it, for a building not used by him as a mansion, or otherwise for purposes connected with his representative character, is governed by the *lex rei sitæ*.<sup>5</sup>

§ 183 *a*. **Homesteads.**—Whether homesteads are subject to the lien of the mechanic depends entirely upon the statutory provi-

<sup>1</sup> Hill v. La Crosse & Mil. R. R. Co., 11 Wis. 214. The constitution of the State of Wisconsin expressly forbids the State to be any party to carrying on such improvements. Col. Piq. & Ind. R. R. v. Coe, 10 Ohio St. 372; Boston, Con. & Mon. R. R. v. Gilmore, 37 N. H. 410; Platt v. N. Y. & Bos. R. R., 26 Conn. 544.

<sup>2</sup> Botsford v. New Haven R. R. Co., 41 Conn. 454.

<sup>3</sup> Laws of Nations, p. 493.

<sup>4</sup> Novello v. Toogood, 1 Barn. & C. 554.

<sup>5</sup> Byrne v. Herran, 1 Daly (N. Y.), 344.

sions of the State where the homestead is located.<sup>1</sup> Prior to the amendment of Mar. 9, 1887, just mentioned, homesteads were subject to execution only "on debts secured by mechanics', laborers', or vendors' liens," wherefore material-men not being named had no lien on a homestead, where the materials were furnished after the property became a homestead.<sup>2</sup> Where a lien is given on "all buildings," and there is nothing in the homestead or other acts exempting it, the property will be liable to this lien. Thus, under a statute providing "that any person who shall perform labor for the erection of any house," etc., shall have a lien, it was held that a building erected as a homestead was responsible to the mechanic.<sup>3</sup> So, where the acts exempting the homestead from sale by execution do not exempt it from sale for the satisfaction of any debt legally incurred for improvements made thereon, and the lien is given "upon lot of ground upon which a house has been constructed," the homestead right cannot prevail over the mechanics'.<sup>4</sup> In Texas the lien of a mechanic for labor or materials in constructing a house or property occupied as a homestead cannot be defeated by the homestead exemption.<sup>5</sup> Yet it has been held in the same State that money due from an insurance company to the owners of a homestead, for loss sustained by fire in the destruction of the home building, is not subject to garnishment by one who held an unsatisfied mechanics' lien on the building before its destruction, where the process of attachment and garnishment cannot issue against homesteads.<sup>6</sup> The provisions of the statute must be complied with substantially in every respect in order to fix a mechanics' lien on the homestead.<sup>7</sup> A homestead is not acquired until the title to the land on which such homestead is established is also acquired, or, at any rate, until the party is in condition to demand title; and all liens acquired before the homestead has been established must be raised, or it will be subject to a forced sale for satisfaction of such liens.<sup>8</sup> Consequently, property not established as a homestead is not protected against the mechanics' lien when the statute is pursued; but if the statute is not complied with, and the property becomes the homestead, no lien is retained, though the party subsequently obtain a judgment.<sup>9</sup> So

<sup>1</sup> [See § 250.]

<sup>2</sup> [Richards v. Shear, 70 Cal. 187, or before that time, but no lien filed till after the said time. Walsh v. McMenomy, 74 Cal. 356, 360.]

<sup>3</sup> Edwards v. Edwards, 24 Ohio, 413.

<sup>4</sup> Thompson v. Wickersham, 9 Jere Baxter (Tenn.), 216.

<sup>5</sup> Potshuisky v. Krempan, 26 Tex. 609; Pope v. Graham, 44 Tex. 196.

<sup>6</sup> Cameron v. Fay, 55 Tex. 58.

<sup>7</sup> Tinsley v. Boykin, 46 Tex. 592.

<sup>8</sup> Farmer v. Simpson, 6 Tex. 303.

<sup>9</sup> Merchant v. Perez, 11 Tex. 20.

the purchaser of materials to be used in the erection or repair of a house on land claimed and occupied as a homestead cannot be considered as a waiver of a homestead right. Nor can the claim be considered as a part of the purchase-money.<sup>1</sup> A statute declared in regard to homesteads that "such exemption shall not extend to any contract for a lien, or upon which a lien would arise under the lien laws of this State, for work done or materials furnished in the erection of a dwelling-house on said land," it was held not to authorize a lien for materials, unless there was an agreement between the parties creating the lien.<sup>2</sup> When "material is furnished, or labor performed upon a homestead, a lien shall be granted," etc., the husband alone, as the head of the family, can in a proper case, in a *bona fide* transaction, where there was no intention to defraud the wife, so contract as to make it subject to the lien.<sup>3</sup> A house and lot which are not in the actual possession of the defendant in execution, but are rented out, are not generally considered as a homestead, or exempt from levy and sale. The use of the family, in such cases, means its possession, and not the use meant by renting it.<sup>4</sup> This right of homestead a debtor may waive as any other privilege, unless restrained by statute, and consent that his exempted property may be applied to the payment of his debts. This consent may be made by acts as well as words.<sup>5</sup> The right of exemption is strictly personal, and will not avail strangers.<sup>6</sup> Although a homestead is made subject to mechanics' liens, yet if no proceeding be taken to enforce the lien, but a personal judgment only be taken against the owner, it will not be liable to execution, when it is generally exempt.<sup>7</sup> Under a statute providing that a homestead exemption "shall not affect any laborers' or mechanics' lien," a sub-contractor furnishing labor and materials both has a lien for them superior to the homestead.<sup>8</sup> Property which is *in fact* a homestead at the time the mechanics' lien is claimed to have attached, is exempt (unless the contract was put in writing), though the material-man had no notice of the fact of homestead.<sup>9</sup> In Tennessee a homestead is not exempt from a mechanics' lien, nor from sale to satisfy a debt "contracted for improvements thereon," even though the

<sup>1</sup> Cogel v. Mickow, 11 Minn. 475.

<sup>2</sup> Coleman v. Ballandi, 22 Minn. 144 ; [Keller v. Struck, 31 Minn. 446 ; Meyer v. Berlandi, 39 Minn. 438.]

<sup>3</sup> Miner v. Moore, 53 Tex. 224.

<sup>4</sup> Kaster v. McWilliams, 41 Ala. N. S. 302.

<sup>5</sup> Clapp v. Thomas, 5 Allen (Mass.), 158.

<sup>6</sup> Baker v. Brintnall, 52 Barb. (N. Y.) 188.

<sup>7</sup> Dean v. McAdams, 22 Kan. 544.

<sup>8</sup> [Merrigan v. English, 9 Mont. 113, 124-125.]

<sup>9</sup> [Mills v. Hobbs, 76 Mich. 122, 126.]

lien has been lost.<sup>1</sup> So in Nebraska a homestead is subject to a mechanics' lien.<sup>2</sup> In Kentucky the lien of a mechanic on a house he has *built* is superior to the owner's claim of homestead, but in case of *additional* improvements the homestead exemption will be superior unless waived in writing signed by defendant and wife, acknowledged and recorded like a deed.<sup>3</sup>

§ 184. **Property protected from Sale by Settlement.** — In Arkansas it was held not to be against public policy nor the spirit of their laws, to donate in perpetuity a lot of ground for charitable purposes, — as for the use of a religious denomination as a place of worship, — and deeds for such purposes should be liberally construed, in order to uphold the trust; and consequently that trustees under a deed of trust, which provided that the "lot of land is never to be sold, or to be used in any other way, only for the use of a church," cannot create a charge upon the lot by a contract for the erection of a house thereon, so as to authorize the mechanic to obtain a lien and sell the lot in payment thereof. They cannot do indirectly that which they are prohibited from doing directly. And if the trustees permit such a lien to be created upon the lot, and suffer it to be sold, thereby defeating the object of the grant, the grantor, though there be no clause of forfeiture in the deed, may apply to a court of equity to set aside the sale and divest the title and possession of the purchaser.<sup>4</sup> Where there has been a voluntary grant of real estate for a railroad, and the statute declares it shall be "held and used for the purposes of such grant only," it cannot be sold and is not subject to the lien.<sup>5</sup> On the other hand, it was held that a proviso in a statute establishing a university, prohibiting the trustees "for any cause, or under any pretext whatever, from encumbering, by mortgage or otherwise, the real estate or any other property of said institution, or involving it in any debt which they have not the means of paying," would not exempt a building erected by the university corporation from the remedies provided by the mechanics' lien laws. To hold otherwise, it was said, would be to declare that all remedies, wherein the judgment is for money, are repealed. General laws are not set aside by a grant of a special privilege that can have any force without it.<sup>6</sup>

<sup>1</sup> [Miller v. Brown, 11 B. J. Lea, 155.]

<sup>2</sup> [Phelps & B. Windmill Co. v. Shay, 32 Neb. 19, 23.]

<sup>3</sup> [Roberts v. Riggs, 84 Ky. 252, counsel citing Phillips, § 183 a.]

<sup>4</sup> Grissom v. Hill, 17 Ark. 483.

<sup>5</sup> Schulenberg v. Memphis, 67 Mo. 442.

<sup>6</sup> University of Lewisburg v. Reber, 43 Penn. St. 305.

§ 185. **Churches, Graveyards, etc.** — In regard to churches and graveyards, a case arose where commissioners were appointed "to define the extent of ground necessary for the convenient use of the building," upon which liens were alleged to exist. The building was a church edifice, and the commissioners included in their report the graveyard, which they recommended to be sold with the church building, because it would be useful for the site of a "parsonage house." The opinion of the court said: Christianity is held to be part of the common law. A religious corporation in this country stands in the place of the parson in England, who, as a corporation sole, holds the legal title to the estates of the church. But those estates could not at common law be seized under writs of execution directed to the sheriff. A sequestration of the profits of the benefice was directed by the bishop to the church-wardens. This applied also to the debts due the king. This practice was adhered to even after the writ of *elegit* was authorized by Westm. 2d. It is true that in the country from which we derive our common law a particular form of worship is favored by the government; while, under our own free institutions, all Christian denominations are entitled to equal privileges. But the obligation to support rational piety is common to all nations, because it is the firmest support of lawful authority, and the highest pledge of the people's safety. It is evident, from what has been said, that if we construe the lien law to extend to houses for worship, by means of judicial process, we deny religion the protection it received under the laws of our English ancestors; and we must draw upon our own practices for the precedent. The revenues of a religious corporation, and the profits of all property held by it, are doubtless within the reach of the creditor by appropriate process. And it is well worthy of consideration, whether all who deal with it do not contract upon the credit of these resources alone. A lien is claimed against the graveyard. The sale by the sheriff of edifices dedicated to the worship of God is sufficiently repugnant to the feelings of a Christian people, without making "merchandise" also of their places of burial. The ground sought to be charged was dedicated to the purposes of Christian burial about fifty years ago. On the faith of that dedication, many families have deposited therein the remains of their relatives. It is not possible to believe that the congregation, in making the erection of a new church, intended to hazard a change of ownership or uses, so far as respects the burying-ground. Nor is it probable that the honest mechanics engaged in erecting the new building

imagined they were acquiring a lien on the graveyard, with its tombstones and mouldering remains. Although "burial and the administration of the sacraments" are usually considered the distinguishing characteristics of a parish church in England, they are not always its constituents under our system of toleration and diversity of opinion and practice. In this case the ground was used for the purposes of sepulture long before the building was erected, and it may be equally useful to the congregation after the new building shall be sold. It is not necessary for the enjoyment of the building, "for the purposes for which it was designed." The building was designed for the worship of God, the ground for the burial of man, — the one for the edification of the living, the other as a receptacle for the dead. The purposes, although frequently combined, are entirely distinct in their nature; and it was therefore error to include the graveyard as subject to the lien.<sup>1</sup>

<sup>1</sup> *Beam v. First Meth. Ep. Church*, 3 Penn. L. J. 343.

## CHAPTER XVI.

## ESTATES SUBJECT TO LIEN.

§ 186. **Entire Estate chargeable with Lien.**—The consideration of the extent of interest chargeable with the lien is so closely connected with the subject, who may create it, the reader is necessarily referred for a complete review of this branch of the law to that chapter in conjunction with the present.<sup>1</sup> To determine who is so far owner as to be capable of charging land with the lien, determines in a great measure the extent of interest charged by it, as the lien always attaches to the extent of ownership; but as the statutes, for the most part, expressly provide that the lien shall extend “to all the estate and interest” of the person making the contract, the same order has been preserved in this treatise. There can be no lien unless the party entering into the contract for building has some estate in the *land*, unless otherwise provided by statute. Accordingly it has been held that where the law creates a lien “on the building and lot of land on which it stands,” and a house is erected on the land of another, there is no lien on it. The house being personal property, the claim is not protected by a lien against it; and the party, not being the owner of the land, has no right to charge the real estate of another.<sup>2</sup> The ownership, moreover, of the building erected upon a lot of land will, so far as the mechanics’ lien is concerned, unless separated by the agreement of the parties, or by express enactment, follow the ownership of the land.<sup>3</sup> So the builders of a bridge for an incorporated company on the land of a third person, knowingly, can have no lien against the owner of the land; nor can a judgment obtained by them against the company be a lien thereon, when the land has never been the property of the company.<sup>4</sup> But, if the party has any interest whatever, it is sufficient to sustain the lien to that extent. Thus a mechanics’ lien law provided that “the lien should extend to the

<sup>1</sup> Chapter VIII.

<sup>2</sup> *Belding v. Cushing*, 1 Gray (Mass.), 576.

<sup>3</sup> *Rees v. Luddington*, 13 Wis. 276.

<sup>4</sup> *Powers v. Armstrong*, 19 Ga. 427.

interest of the employer;" this covered any appreciable interest, though the employer was not the owner. The lien operated on his own interest, and not on that of the owner, unless the employment was at the instance of the latter and on his credit.<sup>1</sup> It extends to the whole interest of the person causing the construction.<sup>2</sup> If the ownership is in fee, the lien is upon the fee; if it is of a less estate, the lien is upon such smaller estate.<sup>3</sup> A mechanics' lien attaches to the building and to whatever interest the person contracting as owner has in the land when the first item of the account is furnished.<sup>4</sup> So where labor is performed, etc., in pursuance of any contract or agreement with the "owner" of a building, which is being erected or repaired, the filing of the prescribed notice creates "a lien for the value of such labor and materials upon such a house or building and appurtenances, and upon the lot of land upon which the same stands, to the extent of the right, title, and interest, at that time existing, of such owner," etc.<sup>5</sup> So the recovery of a plaintiff in a *scire facias sur claim* does not depend upon the quantity of the defendant's interest in the land, as it is a claim against the interest, whatever it is, and can be enforced when obtained against nothing else than that interest.<sup>6</sup> On the other hand, mechanics are not entitled to a lien on any greater interest in property than their employer has.<sup>7</sup> Only the interest of the person who caused the building to be erected or the materials furnished can be sold for the extinguishment of the lien.<sup>8</sup> In Texas only the owner, his agent, or contractor can fix a lien on land, and one in possession under contract of purchase with no power of removal is not an owner of the land or the improvements so that no lien attaches.<sup>9</sup> In this case the vendee failed to pay the price as agreed, and the vendor went into possession. If the mechanics had paid the purchase money they could have secured a lien, but as it was they had none.<sup>10</sup> They are bound to know, at their peril, the extent of interest in land of those they credit.<sup>11</sup> In providing this lien for their security, it was not

<sup>1</sup> Caldwell Institute v. Young, 2 Duv. (Ky.) 582.

<sup>2</sup> Wagar v. Briscoe, 38 Mich. 587.

<sup>3</sup> Choteau v. Thompson, 2 Ohio St. 114; Shields v. Keys, 24 Iowa, 298; White v. Chaffin, 32 Ark. 74.

<sup>4</sup> [O'Brien v. Hanson, 9 Mo. Appeal, 545.]

<sup>5</sup> Randolph v. Garvey, 10 Abb. Pr. 179; Milam v. Bruffee, 6 Mo. 635.

<sup>6</sup> Van Billiard v. Nace, 1 Grant Cas. (Penn.) 233.

<sup>7</sup> Breed v. Nagle, 46 Ga. 112.

<sup>8</sup> [Ness v. Wood, 42 Minn. 427; Bremen v. Foreman, 1 Ariz. 413; Lumber Co. v. Schweiter, 45 Kan. 207, 211; Mills v. Matthews, 7 Md. 315; Lenderking v. Rosenthal, 63 Md. 30; see § 74.]

<sup>9</sup> [Galveston Ex. Ass. v. Perkins, 80 Tex. 62, 67, citing Phil. § 186; see § 69.]

<sup>10</sup> [Galveston Ex. Ass. v. Perkins, 80 Tex. 62, 68.]

<sup>11</sup> Holmes v. Ferguson, 1 Oreg. 220.



intended to relieve them from all care or caution, by subjecting the lot or land on which their labor or materials were applied absolutely to their demands. By limiting their lien to the interest of the employer, they are placed under the necessity, if they trust to it, of inquiring into their interest, and are put upon their guard against reckless undertakings for employers who have no interest in the realty.<sup>1</sup> The material lien attaches to whatever interest the contracting party has at the time the first items of material are furnished, as, for example, the interest of an heir during administration of the estate, and if his interest becomes greater or complete pending the improvements this whole interest will be subject to the lien.<sup>2</sup> If the interest of the contracting party changes during or after the work from a fee to a leasehold, the mechanic may declare against the leasehold or the fee as he chooses.<sup>3</sup> A lien on lands of A. may be enforced against his heir. But no personal judgment can be obtained against the heir.<sup>4</sup> Under section 1838 of the "Consolidation Act" (N. Y.), it is essential that the work or materials for which a lien is claimed shall be work done, or materials furnished for work on lands, the title of which was in the city at the time of the making of the contract under which the work was done, or the materials furnished, and it is essential that the city should have made an appropriation in respect of the very contract for work or materials furnished under which the lien is claimed, for the performance thereof.<sup>5</sup>

§ 187. **Parties in Possession, etc.**<sup>6</sup>—A party in possession is presumed to have an interest chargeable with the lien, until that presumption is overthrown by proof or pleading.<sup>7</sup> He is also, when labor and materials have been furnished for him, estopped to deny that he has any real or beneficial interest in the land.<sup>8</sup> So, where the statute restricts the lien to cases of contract between "the proprietor" of the property improved and the mechanic, the title to the property sought to be subjected to the lien cannot be brought in issue when the statute does not contemplate its trial. An issue, therefore, tendered by the defendant to such a petition—that he was not proprietor of the premises—will be an immaterial one. Nothing, in such event,

<sup>1</sup> *Fetter v. Wilson*, 12 B. Mon. (Ky.) 91.

<sup>2</sup> *O'Brien v. Hanson*, 9 Mo. App. 545, 549.]

<sup>3</sup> *Goldheim v. Clark & Co.*, 68 Md. 498, 504; see § 74.]

<sup>4</sup> *McGrew v. McCarty*, 78 Ind. 496.]

<sup>5</sup> [*Bassler v. Putney*, 53 N. Y. Super. 456.]

<sup>6</sup> [This section cited in *Colman v. Goodnow*, 36 Minn. 9, 10.]

<sup>7</sup> *McCullough v. Caldwell*, 5 Ark. 237; *Dean v. Pyncheon*, 3 Chandler, Wis. 9.

<sup>8</sup> *Horton v. Carlisle*, 2 Disney (Cin.), 184.

can be affected by the judgment, except the interest of the party to the record. If the party have no interest the judgment will confer no lien. The lien will be confined to the actual interest. The rights of third persons, not parties to the suit, remain as they were previously.<sup>1</sup> Mechanics' liens are not to be resisted by the debtor because he has no title. The better title is not affected by the judgment, the owner being no party. If the defendant has any interest in the premises upon which the lien can take effect, that interest is bound; if he has none, the judgment fixing the lien will be harmless.<sup>2</sup> Where only the interest of a party defendant can be sold under an execution to enforce this lien, it seems that a sale of land, under such an execution against a third party, will not be restrained at the suit of one in possession having the paper title.<sup>3</sup> In another case, where *scire facias* was brought, it was decided that, as it was strictly a proceeding *in rem*, the plaintiff was bound to show that the property was chargeable with his lien.<sup>4</sup>

§ 188. **Legal and Equitable Estates.**—It is not necessary that the owner of the estate made subject to the lien should hold the legal title.<sup>5</sup> A mechanics' lien attaches upon an equitable title, and will follow it into whosoever hands it may pass.<sup>6</sup> In New Jersey, however, it is held that the lien law refers only to legal estates, and does not create liens on equitable estates. The language of the law is very broad, saying that the estate of the person erecting a building shall be subject to lien, but the court argued that the consequences would be evil to equitable estates, and that as jurisdiction of what constitutes a lien case was confined by the statute to law courts, the legislature meant to cover only legal estates.<sup>7</sup> Although in New York, where it is given "upon such house or building, and appurtenances, and upon the lot of land upon which the same stands, to the extent of the right, title, and interest at the time existing of such owner," it was said that it would seem that these terms should be taken to mean legal right, title, and interest, and not a mere equity;<sup>8</sup> and consequently, that the lien attached only to the legal right, title, and interest of the owner then existing.<sup>9</sup> But in a subse-

<sup>1</sup> *Falconer v. Frazier*, 15 Miss. 235.

<sup>2</sup> *Porter v. Wilder*, 62 Ga. 520.

<sup>3</sup> *Lehman v. Roberts*, 86 N. Y. 232.

<sup>4</sup> *Brown v. Morrison*, 5 Ark. 217.

<sup>5</sup> §§ 66, 67.

<sup>6</sup> *Justice v. Parker*, 12 N. W. R. 553 ;

[*Clark & Co. v. Parker*, 58 Iowa, 509.]

<sup>7</sup> [*Dalrymple v. Ramsey*, 45 N. J. Eq. 494. Very weak reasoning for Jersey's

eminent judge ; the purpose of the statute and its consequent scope equal to its letter is entirely overlooked.]

<sup>8</sup> *Quimby v. Sloan*, 2 E. D. Smith (N. Y.), 594.

<sup>9</sup> *Ernst v. Reed*, 49 Barb. (N. Y.) 367. *Vide* *Peabody v. East M. S. in Lynn*, 5 Allen (Mass.), 540.

quent case, under the same law, a contractor, who, under the provisions of his contract with the legal owner, had an equitable title to the house which is building, was deemed the owner; the above language being held to be broad enough to embrace an equitable as well as a legal title.<sup>1</sup> So a contract for sale of premises by the owner and builder, made before the filing of the notice of a mechanics' lien, but which, by an instrument executed subsequently to such filing, is shown to have been intended only as a mortgage, does not prevent the lien from attaching upon the equitable interest of the owner at the date of such filing.<sup>2</sup> Ordinarily, either the legal or equitable estate of the person who procures a building to be erected on premises in his possession may be charged with the lien, if it do not interfere with the paramount interests or duties of others,<sup>3</sup> and this whether such interest is a fee-simple estate or less.<sup>4</sup> So where the law is, "that if the person who procures the work to be done . . . has an estate for life only, or any other estate less than a fee-simple, . . . the person who procures the work or materials shall be considered the owner, to the extent of his right and interest in the premises," the lien attaches upon any equitable interest in such estates of the person in possession.<sup>5</sup> Where it was enacted that the lien "shall not be construed to extend to any other or greater estate in the ground on which any building may be erected than that of the person or persons in possession," etc., although by the law no lien existed on the leasehold, yet the right to a conveyance by a lessee, and a subsequent conveyance in pursuance of it, are evidence of an equitable estate in fee from the time the lease is executed, and is such an interest as is subject to the lien.<sup>6</sup> In a late case under the same statute it was reaffirmed that the lien attaches to an equitable interest in the premises.<sup>7</sup> In Connecticut, an equitable title will uphold a mechanics' lien.<sup>8</sup> A law, after declaring what land should be subject to the lien, enacted "but if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to said liens," etc.; the lien of mechanics for labor performed and materials furnished towards the erection or repair of a building attaches upon any equitable interest of the employer in the land.<sup>9</sup> So, where the lien is "upon the estate

<sup>1</sup> *Belmont v. Smith*, 1 Duer (N. Y.), 675.

<sup>2</sup> *McAuley v. Mildrum*, 1 Daly (N. Y.), 396.

<sup>3</sup> *Brown v. Morrison*, 5 Ark. 217.

<sup>4</sup> *Garrett v. Stevenson*, 8 Ill. 261.

<sup>5</sup> *Donaldson v. Holmes*, 23 Ill. 85.

<sup>6</sup> *Bilyean v. Gaule*, 1 Phila. 466; *Lyon v. McGuffey*, 4 Penn. 126.

<sup>7</sup> *Keller v. Denmead*, 68 Penn. 449.

<sup>8</sup> *Middletown Savings Bank v. Fellows*, 42 Conn. 51.

<sup>9</sup> *Crowell v. Gilmore*, 13 Cal. 54.

which the owner had at or before the commencement of the building," etc., the equitable estate of the purchaser with a contract for a conveyance is liable.<sup>1</sup> To the same effect, where "the person who procures the work to be done shall be considered the owner to the extent of his right and interest in the land, and the lien shall bind his whole estate and interest therein," the equitable interest of a party with a contract for the purchase of the land is chargeable to the extent of his interest, but no further.<sup>2</sup> When "whatever right or estate such owner had in the land at the time of making the contract," is made subject to the lien, it covers an equitable estate.<sup>3</sup> But, a lien enforced against a simple equity must be confined to that, and a sale of the equitable interest must be subject to the rights of the legal owner.<sup>4</sup> Again, where "master-builders and mechanics, of every denomination, etc., shall have a lien in the nature of a mortgage upon the tract of land," etc., and "all the right, title, and interest the defendant had in and to the said lot . . . as well as the buildings and improvements erected and made thereon, may be sold to satisfy the judgment," the lien is not restricted to cases where the party for whom the building was erected owned the legal title to the land, but extends to any interest which the party could pass by mortgage.<sup>5</sup> So where a husband bought and paid for a lot, having the deed made to his wife as her separate estate, which deed was not registered, and a mechanic under contract with the husband built a house on the lot, the unregistered deed to the wife was void as to the mechanic, and the lien attached.<sup>6</sup> Where there is a secret resulting trust in a husband, who holds the legal title for the benefit of his wife, and he encumbers it for its improvement, without notice to the mechanic of the wife's claim, and there was an actual sale under judgment for a debt due the mechanic to one who bought without notice, and conveyed to his vendee also without notice, — against these parties the secret resulting trusts, if proven, could not be set up.<sup>7</sup> A trust estate is subject to a laborer's lien. But the court said there might be provisions in the trust-deed rendering the right to enforce a lien by summary process inapplicable.<sup>8</sup> An equitable owner E. in possession is free of a lien for materials furnished by D. to the legal

<sup>1</sup> National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13.

<sup>2</sup> Harsh v. Morgan, 1 Kan. 293.

<sup>3</sup> Seitz v. U. P. R. Co., 16 Kan. 133.

<sup>4</sup> Wagar v. Briscoe, 38 Mich. 587.

<sup>6</sup> Montandon v. Deas, 14 Ala. N. S. 33.

<sup>5</sup> Weller v. McNabb, 4 Sneed (Tenn.), 422.

<sup>7</sup> Ivey v. White, 50 Miss. 142.

<sup>8</sup> [Ricks v. Redwine, 73 Ga. 273, 275; see § 80.]

owner L., who was employed by E. to build the house.<sup>1</sup> The court said that the equitable interest could be held only when E. had actual or constructive notice of the furnishing of the materials. It seems to us that employing L. to build was constructive notice to E. that materials would be furnished, and sufficient to hold his interest. One building for a vendee will have a lien only upon his equitable estate, and not upon the vendor's interest, unless the vendor was a party to the building contract directly or through authority given the vendee to act in his behalf.<sup>2</sup> The lien of a mechanic or material-man attaches to the title of him by whom the building is erected and to that alone, and if the building be erected for the holder of an equitable title, his equitable title alone is bound. But if a person against whom the lien is filed, although the owner of the legal title, is but a mere depositary of it for the benefit of the person on whose order the materials are furnished, and to whose account they are charged, the property will be bound by the lien filed.<sup>3</sup>

§ 189. **Life Estates.** — Life estates acquired either by purchase or operation of law are subject to the lien, unless exempted by express enactment.<sup>4</sup> Thus, where real estate, during coverture, was conveyed in fee to husband and wife jointly, and the question was whether the husband could burden such an estate with a mechanics' lien, it was contended that, when an estate in land is vested in husband and wife during coverture, as they are one person in law, they will not hold—at least in the absence of express words for that purpose—either as joint tenants or tenants in common; they are each and both seised of the entirety. Unlike joint tenants, neither can sever the union of interest without the consent of the other, nor can partition be made between them; and as the wife is seised of an indivisible entirety, there is nothing left upon which the grant of the husband can act. This argument is sound only to a limited extent. It is true that the husband cannot alien any part of the estate which he holds in the same right with his wife. To do so would be to sever its unity, and thus destroy its peculiar characteristics. The reason he cannot do this is because it would convert the estate into a tenancy in common, and defeat the right of survivorship. But the husband has an interest which does not

<sup>1</sup> [Marston v. Stickney, 60 N. H. 112.]

<sup>2</sup> [Henderson v. Connelly, 123 Ill. 98 ; 23 Ill. App. 601 ; Paulsen v. Manske, 126 Ill. 72, 78 ; Getto v. Friend, 46 Kan. 24, 28, 29 ; Lumber Co. v. Schweiter, 45 Kan. 207.]

<sup>3</sup> [Weaver v. Sheeler, 124 Penn. 473 ; Weaver v. Sheeler, 118 Penn. 634.]

<sup>4</sup> In Pennsylvania the estate of a husband in his wife's lands is exempted by recent statutes from payment of his debts.

flow from the unity of the estate, and in which the wife has no concern. He is entitled to the use and possession of the estate during the joint lives of himself and wife. During this period the wife has no interest in or control over the property. It is no invasion of her rights, therefore, for him to dispose of it at his pleasure. The limit of this right is, that he cannot do any act to the prejudice of the ulterior rights of the wife; and the necessary result is, that such lien will attach to the estate which the husband has in the property during the joint lives of himself and wife, and to that alone.<sup>1</sup> The estate which a husband, at common law, has in the lands of his wife—they having had no issue—is a right to the rents and profits during their joint lives; that is, an estate for his own life, determinable by the death of the wife. But having children born alive enlarges the same estate into the larger one of tenancy by the curtesy initiate; that is, should the wife survive, the estate would remain as before, but, should he survive, he would hold it for his own life, as tenant by the curtesy. So that, under a law which provided “if the person who procures the work to be done has an estate for life only, or any other estate less than a fee-simple, in the land on which the work is to be done, . . . the person who procures the work to be done shall nevertheless be considered as the owner, to the extent of his right and interest in the land, and the lien shall bind his whole estate and interest therein,” if, when the contract for building was made, it were only for their joint lives, and subsequently it is increased to an estate by curtesy, the lien will extend to this latter,—the estate having been enlarged in pursuance of a possibility, which existed at the time the contract was made, and constituted a part of its value, and in this respect operated like the termination of a lease, or the removal of an encumbrance.<sup>2</sup>

§ 190. **Estates of Husband and Wife.**—So under a statute providing that “every dwelling-house . . . shall, with the land on which the same may stand, be subject to the payment of all sums that may be due from the proprietor to such contractor,” where the party building is the owner of simply a life estate in his wife’s land, the lien will extend to that interest.<sup>3</sup> Again, where it directs “the interest of the employer to be sold,” a life estate of a wife in land, with the joint seisin of herself and her husband, may be sold on a contract made by the wife, with the assent of her husband, for the improvement of her separate

<sup>1</sup> Washburn v. Burns, 34 N. J. L. 18.

<sup>2</sup> Kirby v. Tead, 13 Met. (Mass.) 149.

<sup>3</sup> Fitch v. Baker, 23 Conn. 563; McCarty v. Carter, 49 Ill. 53.

property.<sup>1</sup> A husband in the actual possession of property, — the wife's real estate, — no trustee of the same having been appointed, under a law which enacted, "that the real estate . . . which are the property of any woman before marriage, or which may become the property of any woman after marriage, shall be and are hereby so far secured to her sole and separate use, that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband, either before or after his death," and that "the receipt or discharge of the husband for the rents and profits of such property shall be a sufficient discharge therefor, unless previous notice in writing shall be given by the wife to the lessee, debtor, or incorporated company from whom such rents and profits are payable," and further "that nothing shall be construed to impair the rights of the husband upon the death of the wife, as tenant by the curtesy," is, notwithstanding the above provisions, so far seised of her real estate, that he has the right to receive the income until she shall give notice in writing; and, though the estate in him is defeasible, it is no reason that creditors may not assert their lien against it, until it is defeated by the act of the wife; and therefore a purchaser, at a sale under a decree against him for the enforcement of a mechanics' lien, may maintain trespass and ejectment against him to recover the possession of such estate.<sup>2</sup> In Rhode Island it is clear that a curtesy initiate may be sold under the mechanics' lien law.<sup>3</sup> But in Missouri an inchoate tenancy by curtesy cannot be the subject of a mechanics' lien.<sup>4</sup> But where "no judgment obtained against the husband of any married woman before or during marriage shall bind, or be a lien upon, her real estate, or upon any interest the husband may be entitled to therein as tenant by the curtesy," a mechanics' lien is included within its provisions, and the curtesy of the husband cannot be levied on and sold.<sup>5</sup> So a general law, prohibiting the sale of a husband's estate by curtesy during the joint lives of himself and wife, prevents a sale of the same interest under a mechanics' lien law.<sup>6</sup> In Connecticut, the interest that a husband has in a ninety-nine year lease owned by his wife is not subject to the lien of one who erects a building on the land under contract with the husband.<sup>7</sup>

<sup>1</sup> Littlejohn v. Millirons, 7 Ind. 125.

<sup>2</sup> Martin v. Pepall, 6 R. I. 92.

<sup>3</sup> [Briggs v. Titus, 13 R. I. 136; 7 131.

R. I. 441; Martin v. Pepall, 6 R. I. 92.]

<sup>4</sup> [Fischer v. Anslyn, 30 Mo. App. 27.]

<sup>5</sup> Woodward v. Wilson, 68 Penn. 208.

<sup>6</sup> Spinning v. Blackburns, 13 Ohio St.

<sup>7</sup> [Flannery v. Rohrmayer, 49 Conn.

§ 191. **Estates of Lessees.** — The estates of tenants for terms of years are also liable for the improvements made by them upon the demised premises. The lien extends to their entire interest under the lease, but does not affect the reversion of the lessor unless he, by some act of his own, has obligated his estate.<sup>1</sup> Under a statute which provides for a sale in satisfaction of the lien of "all the right, title, and interest," which the contracting party had at the time of the contract, it has been expressly decided to embrace leasehold as well as greater estates.<sup>2</sup> A lease is evidence of ownership.<sup>3</sup> So, if there shall be "a lien to the full extent of the labor performed, upon the interest of the person causing the same to be constructed," it covers labor and materials for buildings erected by lessees.<sup>4</sup> Where "the interest of the employer in the land shall be sold," a term of years may be sold.<sup>5</sup> So, when the lien shall extend "to the interest of the employer in the lot and premises on which such building may be constructed," etc., a material-man has a lien on the interest of a lessee of a house, for materials furnished for the house, though the materials be used in a building which stands on ground leased from different landlords.<sup>6</sup> Where the descriptive words of property subject to the lien are "tenants of leased estates," they apply generally to leased estates and their tenants, and there is no warrant to restrict them to tenants of "coal leases."<sup>7</sup> And where a statute provides that the lien "shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs, or to the engine or other machinery furnished for any mill, . . . unless furnished to the owner of the land on which the same may be situate, and not to any contract made with the tenant, except only to the extent of his interest," that part of the section after the disjunctive "or" refers to repairs exclusively; the former part to new buildings, which may as well be erected on land held for a term of years, as upon freehold estates.<sup>8</sup> But where "any person who shall, by virtue of any contract with the owner thereof, perform . . . shall have a lien upon such house or building to the extent of the right, title, and interest at the time existing of such owner," etc., the term "owner," as used in this statute, refers to the erection, and not

<sup>1</sup> See further, Chap. IX., *Harman v. Allen*, 11 Ga. 45; *Collins v. Mott*, 45 Mo. 100; *Reed v. Boyd*, 84 Ill. 66; *Hooker v. McGlone*, 42 Conn. 96.

<sup>2</sup> *Montandon v. Deas*, 14 Ala. N. S. 33.

<sup>3</sup> *Wilson v. Merryman*, 48 Md. 329.

<sup>4</sup> *Barber v. Reynolds*, 33 Cal. 497.

<sup>5</sup> *Littlejohn v. Millirons*, 7 Ind. 125.

<sup>6</sup> *Lavolette v. Redding*, 4 B. Mon. (Ky.) 81.

<sup>7</sup> *Thomas v. Smith*, 42 Penn. St. 68.

<sup>8</sup> *Lyman v. King*, 9 Ind. 3.



to the land on which it is placed. If the land is owned by one person and the building by another, it is only the title of the latter which can be affected by the lien.<sup>1</sup> Where land is owned by a party, with whom a lessee agrees to erect a building at his own expense, a mechanic dealing with the latter is not a sub-contractor, as the party building is to be deemed the owner, and to whatever rights the latter has, the lien of the mechanic attaches.<sup>2</sup> Although a lessee has the privilege of removing machinery, yet its attachment to the soil makes it a part of the estate, and subjects the interest of the lessee in the land to the mechanics' lien.<sup>3</sup> One who furnishes materials for a house on a leasehold with the consent of the lessee has a lien on the leasehold.<sup>4</sup> If under a contract with A.'s lessee a building is constructed on A.'s land with his knowledge, the lien attaches to the fee, unless A. gives notice that he will not be responsible.<sup>5</sup> But where there is a lease for years to C., and B., the reversioner by agreement with C., orders the materials, and afterward sells his reversion to V., who gives value in good faith without notice of the agreement between B. and C., or of the fact that B. had ordered the materials, it was held that no lien attached to the reversion as against V., on the ground that one dealing with the owner of a reversion is only bound to look at the record title.<sup>6</sup>

§ 192. **Lien subject to Conditions of Lease.**<sup>7</sup>—When the lien attaches upon a leasehold interest, it is subject to all the conditions of the lease. Thus, where the lien was given for work and materials, "whether done or furnished at the instance of the owner of the building or his agent," it was held that a lessee, who contracted to build a house, which was on failure of performance of covenants to revert to the owner, and towards which the owner was to loan money, was not the agent of the owner, and that, on failure by the lessee to perform the covenants, the property, with the improvements, reverted to lessor free from the lien of the mechanic.<sup>8</sup> But if one of the conditions be forfeiture for non-payment of rent, the mere failure to pay the rent will not create a forfeiture; there must be a formal demand made on the day it becomes due to effect this. A waiver of the demand will never be implied, for the purpose of making a for-

<sup>1</sup> *Ombony v. Jones*, 19 N. Y. 234.

<sup>2</sup> *Hooker v. McGlone*, 42 Conn. 95.

<sup>3</sup> *Dobschuetz v. Holliday*, 82 Ill. 372.

<sup>4</sup> [*Beehler v. Ijams*, 72 Md. 193.]

<sup>5</sup> [§ 1192 Cal. Code; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275; *Harlan v. Stufflebeem*, 87 Cal. 508, 513.]

<sup>6</sup> [*Beehler v. Ijams*, 72 Md. 193, 198; *Gable & B. v. Preachers' Fund Soc.*, 59 Md. 455.]

<sup>7</sup> [*Approved in Rothe v. Bellingrath*, 71 Ala. 55; see § 84.]

<sup>8</sup> *Cornell v. Barney*, 33 Sup. Ct. N. Y. (Hun) 134.

feiture. From its very nature, a forfeiture cannot take place by consent, and is not favored by the rules of law. The surrender of a leasehold estate operates as a merger in fee, but this will not be suffered to defeat the right of a third party, whose rights intervened before the merger took effect; and therefore a party holding a lien on a leasehold estate has a right to enforce it, notwithstanding a subsequent failure of the lessee to pay rent, and a surrender of the lease to the lessor.<sup>1</sup> But when lessors have only an equitable title to land, and lease it upon condition of repayment of advances, and the lessee makes improvements, material-men and mechanics do not stand in the position of *bona fide* purchasers without notice; the lessor and lessee both having nothing but an unrecorded equitable interest, the law imposes the necessity of inquiring into the title of the lessee. And where the lessee has no title except under an agreement for lease, which provided also for the repayment of the advances made by the lessor, mechanics and others must be regarded as having constructive notice, at least, of the outstanding claim of the lessor for his advances; and this claim has preference over theirs under a law which gives to the mechanic a lien in preference "to all liens which shall attach subsequently to the commencement of the work."<sup>2</sup> Where the lien is given upon "the interest of the lessee for improvements" made by him upon the property, if the lien accrue before the owner of the freehold regains possession, the estate of the lessee is effectually bound by it. The only choice left to the owner is to pay the debt, and thus extinguish the lien, or, if the property be sold under the provisions of the law, to accept the purchaser as his tenant for the remainder of the term. If, however, the landlord has taken a forfeiture of the lease after the lien attached, and has placed another tenant in possession, whereby he has incurred liabilities inconsistent with the rights of the party seeking to enforce his lien against the property, it is his own fault, and he must suffer the consequences.<sup>3</sup> Neither can a mechanics' lien be displaced by an agreement in a lease of the land that the improvements shall become, when built, the property of the lessor; he takes them subject to the liens of mechanics. The lien would be unavailing and illusory unless it commenced with the commencement of the building, and progressed with the progress of its execution, *pari passu*. The lien is inherent in and co-extensive with the work and materials. Every part of the

<sup>1</sup> Gaskill v. Trainor, 3 Cal. 334.

<sup>2</sup> Mills v. Matthews, 7 Md. 315.

<sup>3</sup> Koenig v. Mueller, 39 Mo. 165.

work is done, and every material is furnished, subject to the lien. But no contract can be absolutely and immediately effectual, unless the subject-matter of it be actually existing, or proximately potential as the natural fruit of something that does then exist. The utmost effectuality of such a contract as the foregoing is, that it may be conditional, but cannot attach to the contingent thing unless or until it shall actually exist. Hence the lease on which this lien was reserved did not attach to the buildings until they had been erected. When they were completed, they were encumbered with inherent liens, relating back to the commencement of the work; and, consequently, when the lessor's right first attached to the buildings, it was attached to them as they then were, and he took them *cum onere*.<sup>1</sup>

§ 193. **Right of Removal.** — If the interest of the tenant under his lease includes the right to remove the erection, this will also pass to the purchaser at the sale under the mechanics' lien. As where "any person who shall, by virtue of any contract with the owner thereof, perform any labor . . . shall have a lien upon such house or building to the extent of the right, title, and interest at the time existing of such owner:" and the lessee of an inn erected a ball-room, resting upon stone posts slightly embedded in the soil, and removable without injury to the inheritance; it was held that the ball-room was within the principle of erections made for the purposes of trade, removable by the tenant, and that the right passed to a material-man who purchased the building under execution, on a judgment establishing his lien. As to when the building must be taken from the premises, the general rule has been laid down in many cases, that things which a lessee has annexed to the freehold, if movable at all, must be removed before the expiration of the tenancy. An obvious qualification must be admitted where the tenancy is of an uncertain duration, and is liable to be determined by the happening of some event on which it depends, or by the act of the lessor, as in the case of a tenancy at will. Where the tenancy is of such a character, the supposed abandonment or gift of the fixture to the reversioner, on which the rule rests, can hardly be imputed to the tenant until he has had a reasonable time to effect the removal. And this right of removal is not lost so long as the tenant continues to occupy, although his term has expired.<sup>2</sup> So where "all and every dwelling-house . . . together with the right, title, and interest of the person owning

<sup>1</sup> Trustees Caldwell Inst. v. Young, 2 Duv. (Ky.) 582.

<sup>2</sup> Ombony v. Jones, 19 N. Y. 234.

such dwelling-house or other buildings, in and to the land upon which the same shall be situated, shall be subject to the payment of the debts contracted," etc., and the interest which the owner of the building has in the land is that of a mere occupant, with the right to remove the building, the right of occupancy and removal will pass by a sale under the mechanics' lien; but if the owner of the building, as between himself and others having rights in the land, does not have the power to remove it, a purchaser under the lien will acquire no such right.<sup>1</sup> As the purchaser of property on demised premises, sold under execution to satisfy a mechanics' lien, succeeds to no greater interest in, or higher rights to it, than the lessee possessed, if the lessee's right of removal were conditional or limited, the purchaser's will be so likewise.<sup>2</sup> Where the lien is given in case of leasehold property upon the building with right of removal, and a party seeks to recover the land in ejectment under a paramount title, and the building could not be removed without its destruction, as a hotel, it was held that under the Missouri statutes, the court should have made it a condition precedent to the recovery of the land, that the party should pay the value of the building.<sup>3</sup> When the lien is against the building only, the purchaser on the execution has the right to remove it, and if prevented by the owner, his remedy would be an action to recover damages for the wrongful act.<sup>4</sup> Again, where the lien of the mechanic is confined to the building, and the purchaser under a judicial sale may remove it within a reasonable time thereafter, in the absence of fraud, malice, or oppression, the measure of damages for refusal of a purchaser under a deed of trust to permit a purchaser at mechanics' lien sale to remove the building, is not the value of the building as it stands, but what it would be worth removed from the land.<sup>5</sup> In Iowa, the right of removal of a building to enforce the lien depends upon the fact as to whether it is so far an independent structure as to be capable of being removed without materially injuring or destroying that which would remain.<sup>6</sup> In Georgia it has been held that mechanics' liens upon walls and chimneys only cannot be enforced by levy and sale after substantial additions have been made by others. Mutilation of a building by selling its parts separately is not a method of either law or equity.<sup>7</sup> Where a law provides that

<sup>1</sup> *Jessup v. Stone*, 13 Wis. 466; *Dean v. Pyncheon*, 3 Chandler (Wis.), 9.

<sup>2</sup> *Oswold v. Buckholz*, 13 Iowa, 506.

<sup>3</sup> *Smith v. Phelps*, 63 Mo. 585.

<sup>4</sup> *Seibel v. Siemon*, 52 Mo. 370.

<sup>5</sup> *Seibel v. Siemon*, 72 Mo. 526.

<sup>6</sup> *Conrad v. Starr*, 50 Iowa, 470.

<sup>7</sup> *Gaskill v. Davis*, 61 Ga. 611.

mortgages and other encumbrances created prior to the commencement of the building shall have priority over all subsequent builders' liens upon the lands and upon the erections thereon, "except such as may be removable as between landlord and tenant," it was held that this exception only applies to such buildings erected by tenants on leased lands as are by law removable as between landlord and tenant.<sup>1</sup> In another case, by the terms of the lease, all the improvements that the lessee should put on the premises were to be delivered up with the lot to the lessor at the expiration of the lease; the building in question was erected by the lessee and was a fixture; the lien of the mechanic who erected the building for the lessee was upon the leasehold estate, and no more, and a purchaser at a sheriff's sale acquired by his purchase no greater estate than that of which the tenant was possessed; and, as the latter had no right to remove the building, the former acquired none.<sup>2</sup> But when mechanics and material-men who perform labor upon and furnish materials for buildings erected by lessees upon leased land, and have a lien for the value thereof, and a right to look to the building, they may have an injunction to restrain a subsequent creditor or the lessee from removing the building from the premises, when the security is insufficient without such building. Although not technically waste, the removal would be in the nature of waste.<sup>3</sup> The complaint praying an injunction should, in addition to the allegation of insufficiency of security, aver facts showing the statutory right on the part of the claimant to a lien; otherwise it will be denied.<sup>4</sup>

§ 194. **Pre-emption and Other Rights.** — Estates and interests of the most minute and transient character, and persons owning claims and improvements on the public lands of the United States, whether they are entitled to pre-emptions thereon or not, are embraced within the meaning of a law securing the lien against the owner "to the extent of his right and interest in the premises." The court said, in determining whether improvements made upon public lands are subject to the mechanics' lien law, it is proper to inquire whether a person in possession of, and entitled to, a pre-emption in a tract of public land, has such an estate in the premises as to secure a lien to the mechanic for erecting buildings thereon, under a contract with the person thus in possession. We are clearly of the opinion that he has. The

<sup>1</sup> Heidelberg v. Jacobi, 28 N. J. Eq. 544.

<sup>2</sup> Dutro v. Wilson, 5 Ohio St. 101.

<sup>3</sup> Barber v. Reynolds, 33 Cal. 497.

<sup>4</sup> Quinn v. Mayor, 2 E. D. Smith (N. Y.), 558.

legislature has wisely seen fit to pass a variety of acts, recognizing and affecting the interests in these possessions of the occupants of the public lands. The general government still retains the title to a great proportion of the land in many of our populous and wealthy counties, on which are permanent improvements of great intrinsic value; and hence the necessity of passing laws adapted to property thus peculiarly situated. To allow a class of persons to hold and enjoy large fortunes beyond the reach of their creditors was too shocking to a sense of justice to allow it to pass unnoticed by the legislature; and consequently it has, by repeated acts, treated these improvements as the proper subjects of transfer and ownership. They are made sufficient consideration for contracts and promises. Lands thus owned and occupied are treated as proper subjects for actions of trespass and ejectment; and indeed they are throughout treated as the property of the individual possessing them; and as such they are subject to the control and disposition of the law, so far as the occupant is concerned, as much as if he owned the fee; except, however, that no disposition can be made of them so as to affect in any way a title which may be derived from the United States. To hold that mechanics who have constructed these improvements have no lien upon them for their labor and materials, while mechanics in all other parts of the State are secured by operation of law upon the buildings which they erect, would be attributing to the legislature a partiality and injustice which never could have been intended, and entirely at war with the policy indicated by the whole course of legislation on this subject. It is urged as a reason why the lien should not attach, that the plaintiff could get nothing by a sale of the premises. But this is an objection which comes with but an ill grace from a defendant for whose benefit the improvements were made, and who is in the enjoyment of them. But this objection leads still further, and assumes that if the party should pursue his ordinary remedy, and obtain a general execution, still this species of property is entirely beyond his reach. This is not so. The defendant cannot, after having enriched himself at the expense of the mechanic, and while he is in the open and avowed possession and enjoyment of property, bid defiance to the process of the courts because it is situated on the public lands. His mouth is, as in justice it should be, for ever closed against such an objection. If it cannot be sold because it is of no value, or if the plaintiff choose to bid it in at his own risk, he alone has a right to complain. The purchaser under a legal sale acquires

all the rights, whatever they are, the entire estate, whatever it is, which the defendant has in the premises, to just the same extent that he would by a voluntary purchase from the party, and the purchaser may bring ejectment to recover the possession; and the defendant would be estopped to deny that he had title, as completely as he would be if the proceedings were upon a mortgage which he had executed on the premises.<sup>1</sup>

§ 195. **Dower.**—A widow's dower is not affected by the lien of the mechanic. She is entitled to dower in all the real estate of which her husband was seised during coverture, unless she has released it in the form prescribed by law, except where a lien is created for the purchase-money at the time the husband became seised.<sup>2</sup> Mechanics are bound to know dower will attach, and, on the death of the husband, vest in the widow. This is a risk they choose to run. They can protect themselves against this hazard, but the wife must be passive.<sup>3</sup> Where there are two inconsistent statutes, — one giving a mechanic a lien to the extent of the work done, the other giving the wife dower in all her husband's real estate, — the difficulty must be solved by the application of general principles. A house erected upon land by the owner is real estate. The wife's dower is a favorite of the law, not resting in contract, but resulting from the marriage relation. Hers is the elder lien.<sup>4</sup> In another case it was held that, although a lien law enacted that the lien "shall relate to the time when the work upon said buildings began," etc., "and shall have priority over all liens suffered or created thereafter," etc., that a wife's inchoate interest is not a lien upon, but an estate in, the real estate of her husband, and the liens of mechanics or other persons are not entitled to priority over her right. This right she can mortgage, and the mortgage of such inchoate interest will have priority over mechanics' liens.<sup>5</sup> The mechanics' lien must accrue after the employer's marriage, to give priority to the widow.<sup>6</sup> For, where a house was commenced before its purchase by a husband, he never had any right to it unencumbered by the lien; and his wife, whose right is consequential merely, can have no better and broader title in the house than the husband.<sup>7</sup> Nor is she dowable of improvements made by a purchaser at the sale to satisfy the lien.<sup>8</sup> A sale under a mechanics' lien, which attached before the execution of

<sup>1</sup> *Turney v. Saunders*, 5 Ill. 527.

<sup>2</sup> *Shaeffer v. Weed*, 8 Ill. 511.

<sup>3</sup> *Gove v. Cather*, 23 Ill. 634; *Van Vrouker v. Eastern*, 7 Met. 162.

<sup>4</sup> *Bishop v. Boyle*, 9 Ind. 169.

<sup>5</sup> *Mark v. Murphy*, 76 Ind. 534.

<sup>6</sup> *Pifer v. Ward*, 8 Blackf. (Ind.) 252.

<sup>7</sup> *Nazareth L. & B. Institute v. Lowe*, 1 B. Mon. (Ky.) 258.

<sup>8</sup> *Gove v. Cather*, 23 Ill. 634.

a deed of trust, will revive dower, the deed being defeated thereby, although the wife had joined in the deed of trust.<sup>1</sup> A widow is not a proper party to a proceeding for a mechanics' lien, where her only interest is her dower in the premises.<sup>2</sup>

§ 196. **Lien attaches to Proceeds of Sale.**—When property is the subject of lien which has attached, a sale of the same under order of court does not affect the rights of mechanics, other than to transfer the lien to the proceeds, with a right to payment therefrom. Judicial sales will be more easily and advantageously effected, when it is understood that the property is freed from liens in the hands of purchasers, and when they are not bound to look to the application of the proceeds of sale.<sup>3</sup> So a claim to perpetuate the lien of a mechanic or material-man, if within time in other respects, may undoubtedly be well filed after a judicial sale of the premises. Where the purchase-money is substituted for the land, there is no reason why the lien should not attach itself to it, as it would to the land in the hands of the purchaser, were it liable to the charge.<sup>4</sup> To the same effect in another case, where the property was sold at sheriff's sale before the expiration of the time allowed by law for filing a lien, the claim was allowed to be made upon the fund, with the same effect as it could have been made against the building, if the claim had been entered of record before its sale.<sup>5</sup> So a statute which provided that "whenever any house and lot, subject to encumbrances, shall be sold by authority of any process of any court, the same shall pass to the purchaser free from such encumbrance, which encumbrance shall attach to the proceeds in the hands of the officer making it," discharges the property from mechanics' liens, and the mechanic must look to the proceeds for satisfaction of the lien, instead of to the premises; and this, although a purchaser buys at such sale, with notice of the lien.<sup>6</sup> Again, where the law gives "the lien against the land upon which the work is done," and provides "for the application of the proceeds of sale according to the rights and liens of the respective parties," when work is done or materials furnished they become a part of the land, and, together with the ground upon which the improvement is made, form one entire thing; that is, real estate, which may be sold, the value evolved into money, and the money applied according to the rights of all

<sup>1</sup> Gove v. Cather, 23 Ill. 634.

<sup>2</sup> Shaeffer v. Weed, 8 Ill. 511.

<sup>3</sup> Werth v. Werth, 2 Rawle (Penn.), 151.

<sup>4</sup> Burt v. Kurtz, 5 Rawle (Penn.), 246.

<sup>5</sup> Yearsley v. Flanigen, 22 Penn. St. 489; Barnes's Appeal, 46 Penn. St. 350; Glenn v. Coleman, 3 B. Mon. (Ky.) 133.

<sup>6</sup> Durham v. Mayo, 32 Ga. 192.



parties in interest before the court. The lien created by this law is not against the specific thing furnished, nor necessarily against the interest alone in the land of the party for whom they are furnished, but against the land, and should be satisfied out of the same in any manner consistent with the statute and the principles of equity.<sup>1</sup> So, on foreclosure of mortgage, surplus moneys take the place of land, and are subject to liens;<sup>2</sup> and a balance in court on sale of lessee's interest in land and buildings is liable to lien of mechanic.<sup>3</sup> So, when a lien has been discharged by payment of the full amount in court, the claimant has the right to proceed against the same as if it was the property.<sup>4</sup>

§ 197. **Sale of Entire Estate.**—The power of a court of equity to order a sale of the entire premises on a foreclosure of mortgage, where there are subsequent liens, results necessarily from the nature of the power exercised by it, namely, that the court in making the order is to take into consideration all the liens which exist subsequent to that of the mortgage itself. As these liens are all cut off by the sale, they must be protected by the court which orders the sale, or they are lost. Hence arises the necessity of making all the holders of liens of a date later than that of the mortgage, parties to a foreclosure suit. The equities of all such parties are as much before the court, and as much the objects of its care, as those of the owner of the mortgage primarily to be foreclosed. The court cannot, of course, content itself with giving such directions as will certainly produce satisfaction of the mortgage, without regard to its effect upon those which are subsequent; but should make such an order, as while it fully maintains the priority of the mortgage, will best protect the rights and preserve the equities of all. There is no doubt of the power of the court to order a sale of the whole premises, with a view, not to the satisfaction of the mortgage, but to the better protection of the subsequent liens; and this power might as well be exercised after the sale of enough to satisfy the primary lien as before, so long as the parties and the subject-matter of the action remain before and under the jurisdiction of the court. Nor is it necessary that the claims of the mechanics and material-men should have been reduced to judgments; their inchoate rights after claim filed are sufficient to entitle them to such protection. Whether the court ordering the sale of fore-

<sup>1</sup> *Steigleman v. McBride*, 17 Ill. 300.

<sup>2</sup> *Matthews v. Duryee*, 17 Abb. Pr. (N. Y.) 256.

<sup>3</sup> *Robson's Appeal*, 62 Penn. 405.

<sup>4</sup> *McMurray v. Hutcheson*, 59 How. Pr. (N. Y.) 210.

closure has power or not finally to adjudicate upon the claims of the mechanics, it is its duty to see that the lien, if established, shall not have been defeated by a withdrawal of the fund, and for this purpose it may inquire so far as necessary to ascertain that the claim is not wholly groundless. Where, therefore, it was questionable whether a lien claimed by a mechanic upon several lots and buildings, subject to a prior mortgage, attached for the whole amount to every part of the premises, or only for a distributive portion to each of them, and the greater part, enough to pay the mortgage, had been sold, leaving it doubtful if the remainder were sufficient to satisfy the whole claim, it was competent and proper to make a supplementary order for the sale of the remainder, and to hold the proceeds to abide the adjudication of the claim.<sup>1</sup>

§ 198. **Proceeds in Case of Private Sale.** — Not only in cases of judicial sales, but whenever it is necessary, courts will treat the proceeds of sale of property the same as property. For example, where a building had been wrongfully severed from the freehold and sold for cash, the lien attached to the proceeds; because, had the property not been sold, but remained upon the premises, the prior lien of the mechanic upon it, to the extent of its value, would be undoubted. It having been sold and converted into money, in violation of this prior right, the relief should be to award the money realized from its sale. A court of equity cannot allow rights to be thus destroyed by the wrongful act of one who is substantially claiming to have converted the property of another into money which he may claim as his own.<sup>2</sup> So, a claim duly filed for lien on machinery having been stricken off by agreement, to enable the whole property, consisting of the factory and all the machinery in it, to be sold *en masse* by order of a court of chancery, free from all encumbrances, with notice of the claim of the lien to the trustee at the time of sale, the mechanic has a right to demand satisfaction of his claim out of the proceeds of sale. The fact that the whole property, including the machinery, was sold *en masse* for a gross sum, is not a fatal objection to the claim of lien. The relative value of the machinery may be ascertained by proof on the subject before an auditor or master in chancery.<sup>3</sup>

<sup>1</sup> *Livingston v. Mildrum*, 5 Smith (19 N. Y.), 440.

<sup>2</sup> *Gaty v. Casey*, 15 Ill. 189.

<sup>3</sup> *Wells v. Canton Co.*, 3 Md. 234; reversing *Jones v. Hancock*, 1 Md. Ch. D. 157.

## CHAPTER XVII.

## AREA OF LAND SUBJECT TO LIEN.

§ 199. **Land as well as Building subject to Lien.** — The lien of the mechanic arising out of his right to be paid by a specific appropriation of the building itself, the land on which it is erected has always, from necessity, when owned by the employer, been subjected as well to its payment. Such has been the construction even where there was no express statutory warrant for charging the land. Under an early law, "all and every dwelling-house or other building shall be subject to the payment of the debts contracted for, or by reason of any work done or materials found," etc. Without alluding to the land, it was held to be obvious that a claim to charge the land on which they were erected must be determined on a sound construction of the act, and on established principles of law. There could be no question as to the view of the legislature, which certainly was to give the lien creditors every advantage arising from the house or building, as a fund for the payment of their demands. The project of selling the house without the lot would in a great degree, if not entirely, destroy the fund provided by the legislature. The security and preference given to them would be a shadow instead of a substance. The titles to real property would be infinitely perplexed by one person owning the house and another the lot. In case the house only were sold, the purchaser would have no right to a foot of the adjacent or surrounding ground, and the owner might build against his doors and windows. It would be impossible to trace all the mischiefs resulting from such a proceeding. Upon general principles of law, the lien creditors have a right to sell both house and lot. A grant of the profits of land is a grant of the land. So a grant of a house is a grant of the lot and curtilage. Upon this principle, a lien on the house is a legislative grant of both house and lot to the lienor. When a man grants to another a lien or mortgage on his house, it is in law a lien or mortgage on the lot also.<sup>1</sup>

<sup>1</sup> *Browne v. Smith*, 2 *Browne* (Penn.), 229 ; *Olympic Theatre*, 2 *Browne* (Penn.), 275.

Subsequent statutes have provided in express terms that the lien should extend to the land. But in such cases as "where the court shall direct the house and the interest of the employer in the lot to be sold," etc., it does not intend that the house shall be sold irrespective of the employer's interest in it and in the lot, and therefore there can be no separate sale of the house.<sup>1</sup> So where a statute provided that "the right, title, and interest of the person owning such house in and to the land upon which the same is situated" etc., it was said that in all ordinary cases of liens arising in the construction of a building, it would be mockery to turn the claimant over to a sale of the mere building, without the right to enter upon or occupy the soil. The general rule of law is, that the sale of the building is the sale of the possession, and carries with it the whole right of the judgment debtor, whatever it may be, in the premises.<sup>2</sup> Accordingly it is improper, in a decree for the sale of property to satisfy a mechanics' lien, to direct a sale of the building without the ground on which it stands, though the mechanic may, in the first place, be payable out of the fund from the improvements as against a mortgagee.<sup>3</sup> But if "the lien for the things aforesaid or work shall attach to the buildings, erections, or improvements for which they were furnished or the work was done, in preference to any prior lien, etc., upon the land, etc., and any person enforcing such lien may have such building, erection, or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter," it has been decided not to authorize the sale of the land.<sup>4</sup> And where a lien law gave "mechanics and others, for work and labor or materials furnished for the construction or repairing of any building, wharf, or superstructure," a lien upon such building, wharf, or superstructure, for the work, etc., and also gave a lien upon "the land, if at the time the land belonged to the person who caused the superstructure to be erected," the first clause created a lien upon the superstructure itself, as distinct from the land, and the second a lien upon the land when the same was owned by the person who caused the superstructure to be erected.<sup>5</sup>

§ 200. **Land necessary for Convenient Use of Building.** — The general aim has been to include, as subject to the lien, that extent of ground, and no more, which under all the circum-

<sup>1</sup> *Fetter v. Wilson*, 12 B. Mon. (Ky.) 91.

<sup>2</sup> *Dean v. Pyncheon*, 3 Chandler (Wis.), 9.

<sup>3</sup> *N. Pres. Church of Chicago v. Jevne*, 32 Ill. 214.

<sup>4</sup> *Samuels v. Shelton*, 48 Mo. 444.

<sup>5</sup> *McGreary v. Osborne*, 9 Cal. 119.

stances is reasonably proper and necessary for the enjoyment of the particular building.<sup>1</sup> The builder of farm buildings has a lien on whatever land is contiguous to the buildings, intended to be used with them, and to which they are needful and useful.<sup>2</sup> This is just to the mechanic, and also most for the interest of the owner; for if the estate of the latter must be subjected to sale in order to satisfy the lien, he is largely concerned that the property should bring its full value, which would be frustrated, unless offered under such terms that a bidder might beneficially enjoy his purchase. Accordingly, it has been decided, even where the statute is silent, except giving the lien against "the building," that it extends to the ground necessary to the proper occupation and enjoyment of the house, according to the intention and design of the owner at the time of its commencement, but not beyond these limits.<sup>3</sup> So if there shall be a lien on the building, "with the land on which the same may stand," to construe such a statute literally and strictly would render the lien useless. There can be no value in a building to which there is no access, or which cannot be used conveniently; and it therefore embraces, not only the land covered by the building, but also the land about the buildings, used with it, and necessary or reasonably convenient for its use. In cities, the building lot attached to the house is unquestionably intended; in country villages, lots are generally larger, but equally necessary for the reasonable enjoyment of the various structures erected upon them, and an acre in such villages is not unreasonable.<sup>4</sup> The "lot of land," to which the lien attaches in towns, means the lot as bounded and described on the plats, or as subdivided and bounded by conveyances of the owners, or by other acts done by them for that purpose.<sup>5</sup> Where the lien is given against the "interest of the owner in the lot or land on which the building stands," the lien attaches to the whole lot or subdivision of land upon which the building is erected, and not merely to the ground covered by it.<sup>6</sup> The term "lot" in a city means the fractional, defined subdivision of a block, and the lien claims should be made against that lot only on which the building is, although several contiguous lots belonging to the same owner are inclosed

<sup>1</sup> [White v. Stanton, 111 Ind. 540, 543; Meyer v. Berlandi, 39 Minn. 438, 443; citing Phil. Ch. 17.]

<sup>2</sup> [Lindsay v. Gunning, 59 Conn. 296; 315 *et seq.*]

<sup>3</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

<sup>4</sup> Bank of Charleston v. Curtiss, 18 Conn. 342.

<sup>5</sup> Fitzgerald v. Thomas, 62 Mo. 499.

<sup>6</sup> City of Crawfordsville v. Barr, 65 Ind. 367.

together.<sup>1</sup> Where the statute gives a lien on "so much land as is necessary for the convenient use and enjoyment of the premises," a lot in a town will be deemed to be necessary for said use and enjoyment in the absence of proof to the contrary.<sup>2</sup> Testimony showing that the land and reduction works had been leased together and sold together, tends to prove that the property subjected to the liens has been treated as a unit, and used for a common purpose, and in the absence of any other testimony, or objections, at the trial, the court has the right to infer that the land so used and treated was reasonably convenient for the use of the reduction works.<sup>3</sup> Where there was an act giving to "all persons employed on steamboats an exclusive lien on the steamboat against the owner for their wages," and subsequently an act was passed declaring that "all the provisions of the above act shall apply to steam saw-mills," the lien of the latter act does not attach to all the land that may be in a tract on which a mill stands, but only to the land on which the mill actually stands, and whatever else may be necessary for its successful operation.<sup>4</sup> So, where a lien is given upon the building and the "lot of land upon which the same shall stand," it is not meant merely the ground covered by the building; nor does it necessarily confine the lien to the particular lot, as known on the town plat, on which the building stands. On the contrary, where two adjacent town lots are used without any actual division between them as one mill lot, a part of the buildings and machinery being upon one, and a part upon the other, the lien extends to both lots, though the precise spot where the work was done may be within the limits of one of them. And the case is the same whenever two or more adjacent lots are thrown into one lot, the ideal lines of division being disregarded, and used for a common purpose, whatever that purpose may be.<sup>5</sup> So where the builder "shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated," it was held to include several adjoining lots enclosed by a common fence and used and controlled by the owner of the building for one common and avowed purpose, though as to some he was not the absolute owner.<sup>6</sup> Similarly, where the mechanic "shall have a lien to secure the payment of the same upon such house or building, and the lot of

<sup>1</sup> [Miller v. Hoffman, 26 Mo. App. 199.]

<sup>2</sup> [Pairo v. Bethell, 75 Va. 825.]

<sup>3</sup> [Gould v. Wise, 18 Nev. 253.]

<sup>4</sup> Findlay v. Roberts, 19 Ga. 163.

<sup>5</sup> Choteau v. Thompson, 2 Ohio St. 114.

<sup>6</sup> Ex parte Davis, 9 Rich. (S. C.) 204.

land on which the same stands," etc., a mechanics' lien carries with it such right to the land on which the building stands and which is appurtenant to it, as is reasonably necessary to enable the party holding the lien to hold, appropriate, and use the building for all the legitimate purposes to which it may be put in order to render it available as property, in its full value and usefulness.<sup>1</sup> In another case, where the law provided for a lien on "the building and the land on which it was erected," it was decided to extend to so much of the tract of land on which the house was built as, with the house, would be required to discharge it.<sup>2</sup> The court will not impair the security of lien by limiting the operation of the judgment to any particular part of the premises to which the lien attached, or by exempting, upon any terms or conditions, any part from the operation of the judgment, unless upon a state of facts establishing a high degree of equity on the part of the owner.<sup>3</sup> As where the lien extends to the "lot or tract of land" on which the erections are made, it was held no error, in making a decree in respect to the erection of two buildings on a United States survey of four hundred acres, to include the whole amount.<sup>4</sup> But if the lien extends "to a convenient space around the building, not exceeding two acres," etc., a judgment condemning more than that amount is erroneous, and should be modified.<sup>5</sup> Where it is the duty of the court to find the quantity of land which may be required for convenient use, and there was no allegation or evidence on the point, it was held that a judgment of the court, finding that the whole of defendant's land was required for convenient use, was erroneous, as not within the issues.<sup>6</sup> Failure of the court in decree of sale to designate the area of land to go with the building does not invalidate the decree. The purchaser may get only the land under the building, but the judgment is good.<sup>7</sup>

§ 201. **Curtilage, etc.** — Sometimes the lien is expressly declared to extend "to the lot or curtilage" on which the building is erected. A curtilage seems to connect itself with buildings or messuages, and means the grounds which properly appertain to them, whether they be enclosed within a certain number of feet square in a city, or whether they are enclosed within the court, grounds, or park attached to and appertaining to a country seat,

<sup>1</sup> *Roby v. Corporation of University of Vermont*, 36 Vt. 564.

<sup>2</sup> *Vandyne v. Van Ness*, 1 Halst. Ch. (N. J.) 485.

<sup>3</sup> *Paine v. Bonney*, 4 E. D. Smith (N. Y.), 734.

<sup>4</sup> *Nat. Stock Yards v. O'Reilly*, 85 Ill. 547.

<sup>5</sup> *White v. Chaffin*, 32 Ark. 74.

<sup>6</sup> *Green v. Chandler*, 54 Cal. 626.

<sup>7</sup> [*Sidlinger v. Kerkow*, 82 Cal. 42, 45; citing *Tibbetts v. Moore*, 23 Cal. 213.]

or whether the contents be two, ten, or one hundred acres. The question is in such cases not so much the size of the curtilage as whether it is, and always has been, considered, treated, and known as one entire parcel, lying together, sold together, surveyed together, occupied together by its different owners, its metes and bounds known to all, and always recognized and treated as connecting itself immediately with a farming, a manufacturing, a pleasure, or other establishment. The word "lot" is perhaps still more indefinite in its dimensions. Its proper meaning, when applied to real estate, is a portion of land that has been set off or allotted, whether great or small; but in common use it means simply a piece, parcel, or tract of land, without regard to size. It does not necessarily connect itself with buildings. It may be a small or a large tract. Here, too, the question is not so much the size of the lot or parcel of land, as whether it is one single parcel lying together, known as one tract, bought and sold as such, and as being the tract, lot, or parcel of land which the parties naturally understood as that which would appertain to or be connected with the building or buildings after they should be erected. So that, where a lien claim described the property as the Phoenix Mill, together with the lot and curtilage whereon the same stood, which was designated as "all that tract of land known as the Phoenix Mill property," and was described by metes and bounds; the number of acres appearing by the evidence to be fifty-three; there were, besides the mill, two dwelling-houses on the tract, which were usually occupied by persons employed about the mill; with one house was enclosed seven acres of land; the residue of the land was unenclosed; for thirty years the whole had been known and conveyed as one property,—it was held that the whole tract was properly included in the lot and curtilage whereon the building was erected, and was liable to the lien.<sup>1</sup> In this same case, on appeal, it was said that a curtilage is a piece of ground within the common enclosure belonging to a dwelling-house, and enjoyed with it, for its more convenient occupation. But it does not hence follow, if the landowner, on whose estate there is a lien claim, has only an outside fence around a farm of one hundred acres, that the whole ground enclosed is, *ex vi termini*, a curtilage within the intent of the statute. The lot or curtilage should be limited to so much land as is necessary for the convenient and beneficial enjoyment of the building.<sup>2</sup> In a subsequent case

<sup>1</sup> Edwards v. Derrickson, 4 Dutch. (N. J.) 39.

<sup>2</sup> Derrickson v. Edwards, 5 Dutch. (N. J.) 468.



in the same State, it has been held that the limitation of "the curtilage to half an acre," contained in a lien law, applies to the case, where there has been no designation of the curtilage by the owner, and where the means of designation by map do not exist, and the lien claimant is left to designate the curtilage.<sup>1</sup> In a case where the contest is between the landowner and the material-man, on application by the lienor, the court will appoint a commissioner to make a survey of the land sought to be charged, establish the boundaries of the acre connected with the structure erected or improved, and report such survey to the court; which report should be admissible in evidence with the lien paper, and the two together would make out the lienor's *prima facie* right to the lien.<sup>2</sup> Where the complaint shows plaintiff entitled to a lien extending *prima facie* to the whole lot, any matter limiting it to a part of the lot should be pleaded.<sup>3</sup>

§ 202. **Appurtenances, etc.**<sup>4</sup> — Where a statute provides as follows: "Any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any building on such land or lot, shall have a lien upon the whole tract of land or town lot," a mechanics' lien only extends to the appurtenances upon the premises sought to be subjected to it. Where the appurtenance is in the street, and not upon the lot, as a vault under a sidewalk adjacent and appurtenant to the building, the lien does not reach it.<sup>5</sup> So if pipe is furnished a water company, and a large part of it is laid through the lands of third persons, the land and buildings of the company will not be subject to a lien for the whole values under a statute providing that any person furnishing materials "for any building or improvement on land, . . . shall have a lien therefor on such building or improvement, and on the land on which the same is situated."<sup>6</sup> The lien should be "upon the building and appurtenances." This is not only in accordance with the principles of justice and equity, but necessary, in order to give the full benefits intended. For the main building must be presumed to share in the benefit of improvements on its appurtenances, and if the lien for labor performed upon them were confined exclusively to them, it would often prove not only an inadequate but a totally useless remedy, since the ownership of the

<sup>1</sup> Gerard v. Birch, 28 N. J. Eq. 317.

<sup>2</sup> [Rall Bros. v. McCrary, 45 Mo. App. 365.]

<sup>3</sup> [Bergsma v. Dewey, 46 Minn. 357.]

<sup>4</sup> [See § 203.]

<sup>5</sup> Parmelee v. Hambleton, 19 Ill. 615.

<sup>6</sup> [Eufaula Water Co. v. Addyson Pipe & Steel Co., 89 Ala. 552, 556, 558-559; citing Phillips, 202.]

appurtenances, without the building to which they were appurtenant, would in many, if not most cases, be of no value, and *vice versa*.<sup>1</sup> The New York statutes give a lien on the lot and "appurtenances," under which it is held that a sidewalk is an appurtenance.<sup>2</sup> Where the lien law read that "every dwelling-house or other building, in the construction of which any person shall have a claim for materials furnished, etc., shall, with the land on which the same may stand, be subject to the payment of such claim, and the said claim shall be a lien on such land and building and appurtenances," etc., and a block of buildings, comprising several dwelling-houses, is erected upon a single lot, and work is done upon it as a whole, under one entire contract, the builder's lien extends, as a single lien, to the whole block.<sup>3</sup> If the law declare that "the lien shall extend to the lot on which the building stands, and so much of the adjacent ground of the owner as may be necessary for the purposes of the building," and, again, that "its boundaries shall include the ground necessary for the convenient use of such building for the purpose for which it is designed," and a stable, yard, and original house are all intended by the owner as parts of one tenement, then they indicate "the ground" covered by the lien, and the houses go with the ground. According to this very reasonable doctrine, each of all the buildings erected as one tenement and appurtenances is liable for the work done on the others. All the property was intended to be improved by each building, and all are subject to the lien. This does not make it necessary that the lien for every sort of building shall cover all the land on a portion of which it is erected. It may be a mill, or one of several barns on a very large tract, or a factory or warehouse on one side of it. Such buildings may be entirely independent of the general purposes of the other buildings, and capable of complete separation without injury. The only objection to this view is the extension of the lien to property on which the mechanic or material-man has expended nothing. But plainly this is allowed by the law when it is extended to any ground not covered by the building. It is extended to the marble-mason, who puts up the front without touching any of the back buildings. When the ground and the several houses erected on it are designed for a united enjoyment, the law treats them as a unit in relation to the liens which it gives. Upon this principle liens are given on

<sup>1</sup> *Carpenter v. Leonard*, 5 Minn. 155.

<sup>2</sup> *Brabazon v. Allen*, 41 Conn. 361.

<sup>3</sup> [*Kenny v. Appar*, 93 N. Y. 539; *Beatty v. Parker*, 141 Mass. 523.]

whole lots and all their improvements when streets are opened and sidewalks and cart-ways paved for the common benefit, even though the lots may extend back to the other streets. And so it is in Holland and other countries, where liens are given for the repair of dykes to shut out the ocean, and ditches to drain the country: they are liens on all the properties, adjoining the work or not, that are benefited by it.<sup>1</sup> Under the statute last quoted, the lien for a new wing added to an old building will extend to the whole.<sup>2</sup> So a kitchen is an erection which will authorize the filing of a mechanics' claim, and the lien will extend to the main building to which the kitchen is attached.<sup>3</sup> Again, a claim filed upon a building fronting on a back street, the back part of a large hotel fronting on another street, is entitled to payment out of the fund raised by the sale of the whole building.<sup>4</sup> So, if the lien be reserved on the employer's interest in the entire house, the liens of the contributors to the rear improvements extend to and include the interest of the employer in the front building.<sup>5</sup> And where a chimney-stack is erected in buildings used as a pork-house and for a distillery, a mechanic has a lien on both establishments, under a statute which gives "a lien on every building for the amount of debts contracted for its construction."<sup>6</sup> Under a statute giving the lien "upon such building and upon the interest of the owner thereof in the lot of land upon which the same is situated," and a lien exists for repairs to a boiler, situated in a building joined to a mill, to which it supplied steam, it was held that the whole of the land on which the mill and the building in which the boiler was situated was properly subject to a lien.<sup>7</sup> Where several houses were built on a lot that had never been divided, nor any plan or purpose of division ever indicated by the owner, he having on the contrary erected a stable on the land "to be used by such of the tenants of the several houses as chose to pay rent therefor," it was held that a builder erecting two more houses on the same land had a lien on the entire lot and all the houses.<sup>8</sup> Where there is nothing in the law restricting the right to a lien to those who perform work or furnish materials within the limits of the State, if part of a railroad lies within and part without the State, a lien

<sup>1</sup> *Nelson v. Campbell*, 28 Penn. St. 156.

<sup>2</sup> *Harman v. Cummings*, 43 Penn. St.

322.

<sup>3</sup> *Hershey v. Shenk*, 58 Penn. St. 382.

<sup>4</sup> *Field v. Oberteuffer*, 2 Phila. 271.

<sup>5</sup> *Trustees Caldwell v. Young*, 2 Duv. (Ky.) 586.

<sup>6</sup> *Bodley v. Denmead*, 1 W. Va. 249.

<sup>7</sup> *Kelley v. Border City Mills*, 126 Mass. 148.

<sup>8</sup> [*Quimby v. Durgin*, 148 Mass. 105, 107.]

may be enforced against that part within the State, though the work was done or materials furnished on the part without.<sup>1</sup> A mechanic made a contract with a railroad company to construct depot buildings for the company in the city of Milwaukee, to be paid therefor as the work progressed. The buildings were to be put up in sections. One section was put up, and the company failing to make the payments, the mechanic filed his petition for a lien upon the block, which was composed of a number of lots, on which the building stood, and commenced an action and obtained a judgment against the company; under a statute which extended the lien in the city to one acre, it was held the judgment was a lien upon the building and upon the block to the extent of one acre of land.<sup>2</sup> The lien for work done on any part of a railroad covers the whole railroad, and not merely the part worked upon. A railroad with its depots, etc., is as much an entirety as a dwelling with its kitchen, dining-room, chimneys, etc.<sup>3</sup> The railroad lien is on the road as a whole, though it extends through several counties not on the bridge or embankment on which the work was done.<sup>4</sup> The lien is to be enforced against the whole of the railroad within the State. It cannot be adjudged against a section or portion of it.<sup>5</sup> But a petition praying a lien on a railroad in Jackson county will not be bad on demurrer, although the lien is enforceable against the whole extent of the road in the State and not against a part of it. The court, however, will not assume that the road exists in the State outside of Jackson county.<sup>6</sup>

§ 203. **Separate Buildings.**<sup>7</sup>—Where, however, the buildings are distinct, a lien upon one is not extended to the other. Thus, under an act which gave "to all persons performing labor or furnishing materials for the construction of any building, a lien on the building constructed, to the extent of the labor done or the materials furnished," extended by a subsequent act to include "ditches, flumes, and aqueducts," and a section of a canal, of which the claimant's work was an extension, had been built by a different contractor, and was finished and in use before the claimant's section was contracted for, it was held that, as the two sections were distinct and independent works, the claimant's

<sup>1</sup> St. Louis Bridge Co. v. Memphis R. R., 72 Mo. 664.

<sup>2</sup> Hill v. La Crosse & Mil. R. R. Co., 11 Wis. 214.

<sup>3</sup> [Farmers' Loan Co. v. Candler, 87 Ga. 241, 242 *et seq.*; see § 203.]

<sup>4</sup> [Midland R. Co. v. Wilcox, 122 Ind. 84, 90; § 12.]

<sup>5</sup> [Ireland v. A. T. & S. F. R. Co., 79 Mo. 572.]

<sup>6</sup> [Ireland v. A. T. & S. F. R. Co., 79 Mo. 572.]

<sup>7</sup> [See § 369.]

lien did not extend to it.<sup>1</sup> In another case the defendants occupied several buildings as a woollen factory, on some of which the material was furnished and the labor performed; the mechanics' lien did not extend to all the buildings, but was confined to the building for which the material was furnished, or on which the work was done, under a statute which provided "that any person who shall hereafter, by virtue of any contract with the owner of any building . . . performing any labor . . . shall, upon filing the notice prescribed, have a lien upon such building." It was said, for instance, suppose the main factory had been completed before the dry-house, dye-house, or bleach-house had been commenced, and the defendant should purchase lumber for the purpose of constructing the three last-mentioned buildings, and, after commencing them, the defendant should mortgage the main factory building, would it be right to allow the plaintiff's lien to extend to the main factory building and destroy the lien created by the mortgage, when no part of the lumber was used on that building? This would be contrary to the spirit and meaning of the lien law.<sup>2</sup> A lien on a mill will not embrace lots across the street, although a crib may have been built on them to store corn to be ground in the mill, and a shed where mill-horses and wagons sometimes stand. Such lots are not "appurtenant" to the mill lot.<sup>3</sup> So the lien for labor and materials put into the construction of a dry kiln does not extend to a saw-mill across the street, although owned and operated by the same persons, and receiving steam from the same boilers as the kiln, it appearing that the kiln is operated as a separate business from the saw-mill.<sup>4</sup> On the other hand, where a lien is given for work done on a railroad, "upon the road-bed, station-houses, depots, bridges, rolling-stock, real estate, and improvements of such railroad," a lien for labor cannot be enforced against that portion or section of a railroad only for which they were furnished. The lien is against the whole road, and the whole must be sold, as it would be against public policy to sell detached portions of a railroad.<sup>5</sup>

<sup>1</sup> Canal Co. v. Gordon, 6 Wall. 561.

<sup>2</sup> Dalles L. & M. Co. v. Wasco Woollen M. Co., 3 Oreg. 527.

<sup>3</sup> [Paddock v. Stout, 121 Ill. 571, 580 ; Stout v. Sower, 22 Ill. App. 65.]

<sup>4</sup> [M'Donald v. Minneapolis Lumber Co., 28 Minn. 262.]

<sup>5</sup> Knapp v. St. Louis, Kansas City, & Northern R. Co., 74 Mo. 374 ; [see § 202.]

## CHAPTER XVIII.

AMOUNT SECURED BY LIEN.<sup>1</sup>

§ 204. **When for Whole Amount due.** — The amount of debt secured by the lien in cases of contract between the owner and his immediate contractor, and under those statutes which make the contractor a *quasi* agent of the owner for all legitimate purposes of its performance, is commensurate with the contract price, or, in the absence of contract, with the fair and reasonable value of the work and materials furnished at the instance and request of the owner. The proprietor having himself directly or by agent engaged the expenditure upon his premises, and being personally liable by virtue of his own contract for the payment of the entire sum due therefor, there is no reason why the lien, if it be proper to exist at all, should not be adequate to a full indemnity to the contractor. Accordingly, in favor of such claimants, the lien will be enforced as against the owner, though it require for its satisfaction the sale of the land as well as the improvements, and absorb the entire proceeds. The owner, when the contract is not made immediately by himself or his duly authorized agent, but by his contractor, may show that the price agreed to be paid by the contractor was beyond the fair market value at the time;<sup>2</sup> but, if there is no evidence to show that the materials furnished by a sub-contractor are worth less than the price agreed on between him and the principal contractor, he is entitled to a lien for this agreed price.<sup>3</sup> The owner, when sued by a sub-contractor, would be able to impeach the contract only for fraud or mistake. The contract in either case is admissible in evidence.<sup>4</sup> A mechanic, who undertakes to put on a new tin roof on a building, and fails to perform his contract, is liable to have the contract price recouped by deduction for the defective work, and the actual injury to the building from rain water penetrating such roof by reason of the defective work.<sup>5</sup>

<sup>1</sup> See Chapters VII. and XXV.<sup>2</sup> *Cattanach v. Ingersoll*, 1 Phila. 285.<sup>3</sup> *Hilliker v. Francisco*, 65 Mo. 598.<sup>4</sup> *Cattanach v. Ingersoll*, 1 Phila. 285.<sup>5</sup> [*Gibson, Lee & Co. v. Carlin*, 13 Lea, 440.]

§ 205. **Sub-contractors.**<sup>1</sup> — As a general principle, in the absence of legislation or of express agreement, there is no liability on the part of owners or contractors to respond to parties employed by their contractors. This rule has been enforced even where a provision was made in a contract between a contractor and a sub-contractor, that the former should be entitled to retain in his hands a part of the earnings as an indemnity against the claims of persons employed by the sub-contractors, and it was held that the reservation was of itself no evidence of such an agreement, and gave no right of action to such employees against the contractor personally, or any lien on the fund itself.<sup>2</sup> It has been, however, the policy of many of the States to adopt and at the same time qualify this principle in perfecting their system for the enforcement of this lien. With them no privity of contract is deemed to exist between the owner and sub-contractor. The contractor of a building is not considered to be the agent of the owner, either for the employment of others or the acquisition of the necessary materials to perform his contract. But at the same time, by a kind of equitable subrogation regulated by statute, the sub-contractor and material-man, being the parties meritoriously entitled to be paid, are allowed to intervene between the owner for whom the house was built and the person who had contracted to build it, and divert the course of the payments which would have passed into the hands of such contractor to their own.<sup>3</sup> A sub-contractor has a direct lien for the reasonable value of his labor and materials.<sup>4</sup> The Indiana act of 1883 as amended April 13, 1885, gives sub-contractors a lien for the reasonable value of their services, and if they have been paid such value by the contractor, though not the full price he agreed to pay, they have no lien.<sup>5</sup> Where the mechanic is wrongfully discharged, the value of the work done is to be measured in proportion to the contract price of the whole work.<sup>6</sup> In a mechanics' lien suit it is an error to instruct that the prices agreed upon between the contractor and the sub-contractor are binding upon the owner. The general rule makes the market value, in such cases, the measure of the owner's liability.<sup>7</sup> His claim is measured *prima facie* by his contract price with the contractor, but the owner may impeach such price for fraud or

<sup>1</sup> This section was cited with approbation in *Pool v. Sanford*, 52 Tex. 637; [see § 61 *et seq.*]

<sup>2</sup> *Wells v. Williams*, 39 Barb. (N. Y.) 542.]

<sup>3</sup> *Loonie v. Hogan*, 9 N. Y. 435.

<sup>4</sup> [*Merrigan v. English*, 9 Mont. 113.]

<sup>5</sup> [*Morris v. R. Co.*, 123 Ind. 489.]

<sup>6</sup> [*Watrous v. Davies*, 35 Ill. App.

<sup>7</sup> [*Miller v. Whitelaw*, 28 Mo. App. 639.]

mistake.<sup>1</sup> And a sub-contractor's suit is not maintainable when there is nothing due the contractor.<sup>2</sup> A sub-contractor can only hold the amount due at the time of serving notice on the owner, or subsequently coming due under the contract. The owner is not required to pay twice. He may pay the contractor in advance if he so agrees, and no lien can then attach.<sup>3</sup> So in Texas the sub-contractor under the law of 1884 can only hold the amount due or to become due the contractor under contract.<sup>4</sup> So in Michigan, California, and West Virginia a sub-contractor can enforce his lien against the owner only to the extent of the sum due the contractor at the time of filing notice of the lien.<sup>5</sup> Where at the time of the filing of a mechanics' lien, there is nothing due the contractor from the owner of the premises, and before any further sum becomes due under and by the terms of the contract said contractor abandons it and refuses to go on with the work, and there is no provision in the contract for the completion of the contract by the owner in case of failure to perform by the contractor, nothing remains unpaid within the meaning of the mechanics' lien law (sec. 1, chap. 342, Laws of 1885) so as to make the notice of the lien effectual to charge the premises with the claim of the lienors; and this, although it appears that the work necessary to complete the contract remaining undone, would cost less than the balance unpaid of the contract price for the entire work. "The purpose of the statute known as that relating to mechanics' liens is to enable those doing work or furnishing materials to be used upon structures on real estate, to obtain security and payment through the means and in the manner provided by it; but in no cases shall the owner of the premises be liable to pay by reason of liens filed pursuant to the act a greater sum than the price stipulated and agreed to be paid in such contract, and remaining unpaid at the time of filing such lien, or in case there is no contract, than the amount of the value of such labor and material then remaining unpaid (Laws of 1885, chap. 342, sec. 1). . . . It is claimed that the right of a lienor is something more and beyond that of subrogation to the rights of the contractor, and that if it can be ascertained that at the time the lien is filed the latter had earned any amount which was unpaid, the lien is effectual to

<sup>1</sup> [Leeds v. Little, 42 Minn. 414.]

<sup>2</sup> [James v. Davidson, 81 Wis. 321.]

<sup>3</sup> [Fullenwider v. Longmoor, 73 Tex. 480.]

<sup>4</sup> [Clark v. Gillespie, 70 Tex. 513.]

<sup>5</sup> [Bourget v. Donaldson, 83 Mich. 478 ;

Harmon v. S. F. &c. R. Co., 86 Cal. 617, 619 ; McGugen v. Ohio River R. Co., 33 W. Va. 63, 70 ; Douglas v. McCord, 12 Bradw. 278 ; Pinkston v. Young, 104 N. C. 102, 104 ; Gibson v. Lenane, 94 N. Y. 183.]



reach it, although the contractor has, before such filing, abandoned the work, and is not entitled to assert any claim against the owner; and to support that proposition are cited *Wright v. Roberts*, 43 Hun, 413; *Van Clief v. Van Vechten*, 48 Id. 304; *Sheffield v. Loeffler*, 20 N. Y. S. R. 890. Those cases go farther than any other to which our attention has been called, and the last one cited seems, as reported, to go so far as to determine that a lien filed by a sub-contractor after abandonment of the work by the contractor, may be supported by proof of the amount paid to the latter, and the sum that the completion of the work would cost, and the difference between the amount of those two sums, and the contract price for the entire work, if the latter exceed that amount, is available to discharge the claim of the lienor as against the owner. It may be seen that this could properly be done if the sub-contractor offered to go on and complete the contract, or if there was some provision in the contract, or otherwise made, which in some manner might be construed to save the right of the sub-contractor; otherwise it is difficult to see how the doctrine of that case has any well-founded principle for its support. The facts of that case may not be fully disclosed in the report of it as there made. The theory of that, as well as the others of those cases, evidently was that the contractor had earned an amount unpaid at the time of filing the lien, and that the proof of such difference was evidence upon the question of the amount so earned in excess of what had been paid. But in the present case there is no finding that the contractor McMullin had earned anything more than he received in payment upon the contract, nor was there any request made to the referee to find any such fact."<sup>1</sup> In Arkansas the law provides that if a sub-contractor gives notice to the owner before performing work or supplying materials, it shall be the duty of the owner to reserve for ten days after the contract is completed one-third of the cost of the improvement, which shall be subject to the liens of sub-contractors. When the owner does so reserve the fund, the sub-contractor can recover to the full extent of the price the contractor agreed to pay him to the extent of the said one-third. But it is held that although proper notice was given the owner, yet if he fails to reserve the said fund, the sub-contractor can only compel him to pay the real value of the work or materials, and not the price agreed upon by the contractor and himself.<sup>2</sup>

<sup>1</sup> [*Larkin v. McMullin*, 120 N. Y. 206, 208, 211, 212; see *Wright v. Roberts*, 43 Hun, 413; *Vogel v. Luitwieler*, 52 Hun, 184.]

<sup>2</sup> [*Basham v. Toors*, 51 Ark. 309, 313.]

Where the contract provides for forfeiture in case of the contractor's default or breach, and for completion of the contract according to plans and specifications with the right to deduct expenses from the contract-price, the expense of taking down and rebuilding part of the work faultily done, may, in case of such a forfeiture, be deducted.<sup>1</sup> In an action on a mechanics' lien, the original contractor may plead counter-claims which did not arise out of the contract sued upon, and, if he does so, the owner will obtain the benefit of a consequent reduction of the plaintiff's claim, since the judgment against the property subjected to a lien cannot exceed that against the original contractor; but the owner cannot himself assert such independent counterclaims, whether in favor of the sub-contractor or himself, in order to secure such reduction.<sup>2</sup> A sub-contractor is not entitled to a lien for loss and expense arising from idleness caused by the fault of the contractor.<sup>3</sup>

§ 206. **Entitled to Extent of Funds due by Owner to Contractor — New York.**<sup>4</sup> — In New York it was early provided<sup>5</sup> that "every mechanic, . . . whether such work shall be performed as journeyman, laborer, sub-contractor, or otherwise, and whose demand for work and labor . . . has not been paid and satisfied, may deliver to the owner of such building an attested account, . . . and thereupon such owner shall retain, out of his subsequent payments to the contractor, the amount of such work and labor, for the benefit of the person performing the same." This statute was subsequently amended,<sup>6</sup> in that "any person who shall hereafter, by virtue of any contract with the owner thereof, or his agent, or any person who, in pursuance of an agreement with any such contractor, shall, in conformity with the terms of such contract, perform any labor, or furnish materials, shall, upon the filing the notice, . . . have a lien . . . upon such house or building and appurtenances, and upon the lot of land, . . . to the extent of the right, title, and interest . . . of such owner, . . . but such owner shall not be obliged to pay for or on account of such house, . . . in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract." Under this law an owner cannot be compelled to pay, including all voluntary payments made in good

<sup>1</sup> [Powers v. Yonkers, 114 N. Y. 145, 152.]

<sup>2</sup> [Uthoff v. Gerhard, 42 Mo. App. 256.]

<sup>3</sup> [Tabor v. Armstrong, 9 Colo. 285, 289.]

<sup>4</sup> This section was cited with approbation in Pool v. Sanford, 52 Tex. 637.

<sup>5</sup> April 20th, 1830, ch. 330.

<sup>6</sup> July 11th, 1851, ch. 513.

faith, according to the terms of his contract, before the notice is filed, any greater sum than the contract price. Every payment which the owner makes in pursuance of his contract is, in every just sense, a discharge of the lien. Otherwise, no owner could safely make a contract for the erection of a building, and agree to pay for it to the contractor by instalments, or at a specified time. If he improve his lots, he must, in order to be safe, pay every laborer and every material-man himself, or run the hazard of being forced to pay a second time. To authorize such a construction the statute must be explicit. Such an inference would prove in the end prejudicial to mechanics and laborers, by discouraging improvements. If the legislature wished to drive every builder who has not already amassed a fortune from the market, and give a monopoly of all the building contracts to wealthy men, who, by their large means, could give the owner assured guaranty against loss from liens of sub-contractors and laborers, they might pass a law making the owner absolutely responsible. The true construction is, that when an owner has contracted with another to build a house, all sub-contractors and others, furnishing labor or materials to the contractor, do so, with reference to such contract, in subordination to its provisions and to the rights of the respective parties thereto, so far as they rely upon the owner or his house as security. It is no hardship on sub-contractors to hold them constructively notified of the provisions of the contract between the owner and contractor. They know they are not dealing with the owner; they know, or ought to know, when and upon what contingencies the owner will be bound to pay; and if they labor or furnish materials, in any sense, upon the credit of the owner or his house, they should do so upon the credit which the terms of the contract offer for their reliance.<sup>1</sup> These views involve the necessity of taking into account previous liens in any proceeding on behalf of a sub-contractor, in order to determine how much the owner or the premises shall be adjudged liable for;<sup>2</sup> for the existence of prior liens, sufficient to absorb the fund remaining in the owner's hands, is always a good defence in an action brought by a sub-contractor against the owner. But the claimant in that action may deny their validity, and, if he succeed in impeaching them, take judgment for the amount of his lien, if there be a sufficient fund in the owner's hand, or, if not, a judgment to the

<sup>1</sup> Doughty v. Devlin, 1 E. D. Smith (N. Y.), 625; Spalding v. King, Id. 717; 647. Pike v. Irwin, 1 Sandf. (N. Y.) 14.

<sup>2</sup> Cronk v. Whittaker, 1 E. D. Smith,

extent of that fund. In certain cases it might be necessary to institute a suit in equity, in the nature of a bill of interpleader, to adjust the rights of the respective claimants.<sup>1</sup> One supplying materials to one of two joint contractors with the knowledge of the other, acquires a lien to the extent of the whole amount due both contractors. The case was this: T., a carpenter, and B., a mason, made separate bids upon separate proposals for the mason and carpenter work upon a house for S. Their bids were accepted, and a joint contract was entered into between them and S., there being, however, as between the contractors, no community of interest. During the progress of the work, T. bought lumber of the plaintiffs, which was sold to him with knowledge on their part that it was to be used in the construction of the house, and it was so used with the assent of B. Plaintiffs, not having been paid, filed a mechanics' lien. In an action to foreclose the same, it appeared that there was a balance unpaid on the contract which belonged equally to T. and B., all of which would be required to pay plaintiffs' claim. The judgment awarded to plaintiffs the whole of this balance. Held, no error; that although B. and T. were not partners in the contract, the lumber having been furnished with the assent of both, plaintiffs acquired a lien for the amount of his debt upon the whole unpaid portion of the contract price.<sup>2</sup> All that the statute requires as the condition of the lienor's right to such reimbursement is that the labor shall be done upon or the material furnished for the building in process of construction, with the assent of the owner or of the contractors. Both conditions were established in this case. The lumber was so furnished and used. It was done with the assent of both contractors. Baur knew that it was supplied for use in the performance of the joint contract; saw it so used, not only without objection, but availing himself of it *pro tanto* in earning the contract-price; consciously took the benefit which it conferred, and so assented to its supply. Under the joint contract, and relatively to the right of the owner, Baur was as much bound to furnish it as Thornton, and might have been obliged to furnish it himself if Thornton had not. It is therefore impossible to deny that the plaintiffs furnished the lumber used in construction, and applied in the due performance of the joint contract, with the assent of the contractors, not merely of one, but of both; and so the conditions existed which, under the law, gave the sub-contractor a lien for the amount of

<sup>1</sup> *Lehretter v. Koffman*, 1 Code, N. S.      <sup>2</sup> [*Pell v. Baur*, 133 N. Y. 377.]  
(N. Y.) 284.

his debt upon the unpaid portion of the contract-price.<sup>1</sup> If the contractor abandons the contract without just cause, and the owner completes the building in accordance with and under a provision of the contract permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed.<sup>2</sup>

§ 207. **California.** — The same provisions have been substantially re-enacted in California. There it has been held, when an owner of property has contracted with another to erect a building, or do any other work, under a statute which provided "if any money be due or is to become due, under the contract, from said owner to said contractor, on being served with a notice by a sub-contractor, said owner may withhold, out of the first money due or to become due under the contract, a sufficient sum to cover the lien claimed by such sub-contractor," etc., that it does not give a lien for the entire amount which may be due a sub-contractor, unless the owner has an amount equal to it in his hands which is due to the contractor.<sup>3</sup> And further, that when an owner of property has contracted with another to erect a building or do any other work, or furnish materials therefor, all sub-contractors and parties agreeing to furnish labor or materials to such original contractor do so with reference to such original contract, in subordination to its provisions and to the rights of the respective parties thereto, so far as they relate to the liability of the owner or the property, or so far as they rely on such liability; and any agreement such parties may make with such original contractor is, so far as relates to the owner or the property, subject to all the terms, agreements, conditions, and stipulations of such original contract; and the owner or the property cannot be held liable or bound to any extent beyond the terms of the original contract, or such new or further contract as he may make with the original contractor. Any other rule would place the owner and his property completely at the mercy of the contractor; would give the contractor the power, without any authority whatever, to make contracts binding the owner and his property. There is nothing in the relation of the parties which can by any rule of law vest in the contractor any such

<sup>1</sup> [Pell *et al.* v. Baur, 133 N. Y. 377, 382.]

<sup>2</sup> [Van Clief v. Van Vechten, 130 N. Y. 571; Larkin v. McMullin, 120 N. Y. 206; Powers v. City of Yonkers, 114 Id. 145; Mayor, &c. v. Crawford, 111 Id. 638; Graf v. Cunningham, 109 Id. 369; Taylor v.

Mayor, &c., 83 Id. 625; Heckmann v. Pinkney, 81 Id. 211; Gibson v. Lenane, 94 Id. 183; Rodbourn v. Seneca Lake Grape & Wine Co., 67 Id. 215; Lombard v. Syracuse, B. & N. Y. R. R. Co., 55 Id. 491; 15 Am. & Eng. Encyc., 78, 84.]

<sup>3</sup> McAlpin v. Duncan, 16 Cal. 127.

power. The owner, without previous statutory enactment, cannot be held liable upon the contract between the original contractor and the sub-contractor, as there is no privity of contract between them.<sup>1</sup> So where a lien is given to sub-contractors "to the extent of the original contract-price" between the owner and contractor, it could not have been the intent, nor was it within the power, of the legislature, as to contracts in existence, to give a lien for an amount exceeding the sum to become due to the contractor. And where the same statute declared, in addition to the foregoing quotation, that the lien of the contractor "shall be and enure primarily to the benefit of all persons who, as employees of the original contractor or his assigns, shall perform work and labor or furnish material for the construction or repair of such building," etc., and "after the payment of such material-men, workmen, . . . such lien shall enure to the benefit of the original contractor," no lien is provided for such workmen and material-men except such as arises under and flows from the original contract; and no other or greater lien can by legal possibility enure to their benefit, without subjecting the employer to a contract that he never made. So the employees of sub-contractors are subject to all the conditions of the contract between the contractor and sub-contractor. This law does not create one lien for the benefit of the contractor and another for the benefit of his employees, but the lien arises, as the contract is performed according to its terms, for the benefit of both contractor and employees, preferring the employees to the contractor in the distributing of the sum due. It therefore necessarily follows that the employees cannot acquire a lien upon the house independent of the original contract, and that they are not entitled to liens as principals, though entitled to be paid first out of the moneys becoming due under the contract. If payments have not been prematurely made by the owner to the contractor, before the lien of a sub-contractor has attached, the latter, and his employees, are not entitled to demand anything from the owner or contractor. The contrary doctrine cannot be true, unless it can be demonstrated that a party who has fully complied with the terms of his agreement can be held responsible for an amount exceeding that which he agreed to pay.<sup>2</sup> So any agreement between contractors apportioning the job and compensation of building a house among themselves, and to which the employer is not a party, does not prevent a material-man

<sup>1</sup> Bowen v. Aubrey, 22 Cal. 566.

<sup>2</sup> Dore v. Sellers, 27 Cal. 591 ; Knowles v. Joost, 13 Cal. 620.

from enforcing his lien for materials furnished one joint contractor, although it appears that when notice was given there was nothing under the apportionment due to the particular contractor to whom the materials were furnished.<sup>1</sup> Again, where the law gives a lien "to the extent of the original contract price," the right of a material-man to a lien on the land and building, for materials furnished the contractor, depends for its existence upon the fact of a debt due from the owner to the contractor at the time or subsequent to the notice of the material-man. Therefore, where the contract was to erect a building and furnish the materials for a stipulated price, with a right to reserve twenty-five per cent until the whole work was completed, and the contractor abandoned the work, having received more than was due him, except the twenty-five per cent, material-men who had furnished the contractor with materials have no lien as against the owner until complete performance.<sup>2</sup> It is held that prior to the act of March 18, 1885, the California statutes, on notice to the owner from a sub-contractor that money is due him from the contractor, did not make it the *duty* of the owner to retain any part of the contract price, in order to satisfy a lien the sub-contractor might subsequently file.<sup>3</sup> The sub-contractor was bound by the terms of the contract between the owner and contractor. But if the owner, with notice that the sub-contractor has furnished materials, etc., paid money to the contractor *before* it was due by said contract, he must be held liable to the material-man to the extent of the money thus prematurely paid.<sup>4</sup>

§ 208. **Connecticut and Tennessee.** — In Connecticut, where it was provided that "every building, for the construction or repair of which any person shall have furnished materials or rendered services, shall be subject to the payment of the claim for such services and materials, — such liens not to exceed in the whole the amount to be paid by the proprietor to the original contractor," a sub-contractor comes in under the original contract, and if he, at the instance of the contractor, did work not contemplated by the contract, to remedy defects of work performed under the original contract, and of which the proprietor had not approved, and there was nothing due the contractor by the owner, the sub-contractor has no lien on the building for the work done by him.<sup>5</sup> Again, in Tennessee, if "the benefit of the lien be

<sup>1</sup> Davis v. Livingston, 29 Cal. 283.

<sup>2</sup> Blythe v. Poultney, 31 Cal. 233.

<sup>3</sup> [McCants v. Bush, 70 Cal. 125.]

<sup>4</sup> [Walsh v. McMenomy, 74 Cal. 356, 359.]

<sup>5</sup> Spaulding v. Thompson, Ecc. Soc., 27 Conn. 573.

extended to the journeymen workmen of an undertaker, . . . provided notice in writing of said lien shall be first given to the owner or proprietor of said lot, . . . or to his agent, at the time said work is begun or material furnished," etc., notice is necessary from a material-man to the owner or proprietor, and if it be not given until after payment by the latter to the contractor of the stipulated price, there is no lien. His remedy is only against his immediate employer, with whom he stands in the relation of general creditor.<sup>1</sup> It being said, under the New York statute referred to above, the only exception to the rule that the sub-contractor can acquire no lien, when at the time of filing the notice there is nothing due to the contractor, is the case where an assignment has been made by the contractor of his rights under the contract for the benefit of his creditors, in which case the assignees stand in the place of the assignor, and act substantially for his benefit, if the contract is performed by them, or they become entitled to payments thereunder. Under such circumstances, a sub-contractor may acquire a lien on the fund in the hands of the owner to the same extent as if the assignment had not existed. But it is otherwise where it is shown that, prior to the filing of a notice by a sub-contractor, the contractor, in good faith, and for a valuable consideration, had transferred to a purchaser the right which he might thereafter acquire to any payments under the contract. The purchaser, by the transfer, takes all the rights of the contractor under the contract; and a sub-contractor, who at the time of making his contract had full knowledge of the transfer, has, as against the purchaser, no lien.<sup>2</sup>

§ 209. **Moneys to become due.** — While the limit of the owner's responsibility to the sub-contractor and material-man is the price stipulated in his contract with the original contractor, and no lien exists for more than the contractor himself may claim, still it has been held that the sub-contractor's right will attach, upon filing the proper notice, as well to moneys subsequently becoming due, as upon those which are already due when service was made. Thus, under a law, "but such owner shall not be obliged to pay for or on account of such house, . . . in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract," the owner may be compelled to pay moneys which may become due after

<sup>1</sup> Brown v. Crump, 2 Swan (Tenn.), 531.

<sup>2</sup> Oates v. Haley, 1 Daly (N. Y.), 338.



the filing of the notice, to the satisfaction of the lien. The time when the notice is filed is not the time to inquire if money be due from the owner, but the time of the foreclosure of the lien, and if it be then due, the sub-contractor will be entitled to judgment.<sup>1</sup> The lien attaches to the *locus in quo* to the extent of any sum then due, or which thereafter becomes due, pursuant to the contract under which the work is being done.<sup>2</sup> So, where a sub-contractor or material-man served an attested account on the owner, under a statute which required "such owner to retain out of the subsequent payments to the contractor the amount of such work and labor, for the benefit of the person so performing the same," the owner is responsible for any balance due to the contractor at that time, or accruing afterwards, and the claimant is regarded as an assignee, *pro tanto*, of the contractor's demand.<sup>3</sup> If the sub-contractor show that, at the time of filing the notice, a debt was due and owing to the contractor by the owner, or that subsequent to the notice a debt under the contract became due, he will be entitled to judgment against the owner for the amount.<sup>4</sup> But the owner cannot be required to make payment until the moneys become payable by the terms of his contract.<sup>5</sup>

§ 210. **What Credits Owner entitled to.** — In estimating what is due by the owner to the contractor at the time of notice by a sub-contractor, or what has become due subsequently, an owner is always entitled to credit, as against such claimant, for whatever sums he may have in good faith, before notice, paid the contractor according to the terms of his contract.<sup>6</sup> It is probable, however, that if the owner and contractor should collude together, and agree upon a settlement in respect to the contract price, or any extra work connected with the contract, for the purpose of depriving parties, who may have contributed their labor or materials to the erection of the building, of the lien which the statute intends to secure to them, the court would disregard any settlement which appeared to have been made for such purpose; and, in determining as to the intent of the parties, evidence showing that the value of the extra work performed was grossly disproportionate to the amount allowed for it on the settlement might not only raise the presumption that the settlement was fraudulent in respect to lien creditors, but would, unex-

<sup>1</sup> Doughty v. Devlin, 1 E. D. Smith (N. Y.), 625; Pendleburg v. Meade, Id. 728.

<sup>2</sup> [Van Clief v. Van Vechten, 130 N. Y. 571.]

<sup>3</sup> Rudd v. Davis, 1 Hill (N. Y.), 277.

<sup>4</sup> Schneider v. Hobein, 41 How. Pr. (N. Y.) 232.

<sup>5</sup> Pendleburg v. Meade, 1 E. D. Smith (N. Y.), 728; Cronk v. Whittaker, Id. 647.

<sup>6</sup> Thompson v. Yates, 28 How. Pr. (N. Y.) 142.

plained, afford strong ground for declaring it to be so in fact.<sup>1</sup> So, too, an owner has been allowed for all demands he held against the contractor at the time the attested account was served, that might have been set off in an action brought by the contractor himself; such, for example, as money lent.<sup>2</sup> This case was reversed on appeal, the court holding that the fund could only be reduced by payments *bona fide* made, and not by a general debt by way of set-off.<sup>3</sup> In a subsequent case, however, it was again decided that, as in a proceeding to foreclose a mortgage, any claim of the mortgagor against the mortgagee might be set up to reduce the amount of the plaintiff's recovery; so in this proceeding, which is of an equitable character in New York, a set-off by the owner of a demand due to him by the contractor was proper.<sup>4</sup> Where the contractors gave an order on the owner for \$390, payable out of the last payment on the contract, and the owner paid \$350 in full settlement of the order, it was held that he was entitled to credit for the full amount of the order, \$390.<sup>5</sup> If the work or materials are not of the quality agreed for, the amount of the lien will be the contract price, less the sum necessary to put the work in the shape contracted for.<sup>6</sup> The amount of a sub-contractor's lien cannot exceed the original contract price of the owner after deducting all amounts paid by him on the contract before the sub-contractor begins work or the delivery of materials.<sup>7</sup> In a sub-contractor's lien suit the owner cannot set off a claim not growing out of the contract under which the lien claim arises.<sup>8</sup> When the contractor under an unrecorded contract sues the owner for the reasonable value of the building, the owner may off-set the amount paid by him to settle liens, attorneys' fees, etc., of material-men, who supplied the contractor.<sup>9</sup>

§ 211. **Sub-contractors, etc., no Right to repudiate Contract with Owner, etc.**—It has been the invariable construction given to the statutes quoted in this chapter, that whatever may be the right of a contractor to repudiate a contract which he has been induced to enter into by fraudulent representations of the owner, and sue for damages for the deceit, or upon a *quantum meruit*, sub-contractors, laborers, and material-men have no right to repudiate the contract between the owner and contractor, and

<sup>1</sup> Smith v. Coe, 2 Hilt. (N. Y.) 365.

<sup>2</sup> Miner v. Hoyt, 4 Hill (N. Y.), 193.

<sup>3</sup> Hoyt v. Miner, 7 Hill (N. Y.), 525.

<sup>4</sup> Owens v. Ackerson, 1 E. D. Smith (N. Y.), 691.

<sup>6</sup> [Kenney v. Apgar, 93 N. Y. 539.]

<sup>6</sup> [Beha v. Ottenberg, 6 Mackey (D. C.), 348.]

<sup>7</sup> [Teahen v. Nelson, 6 Utah, 363,

368.]

<sup>8</sup> [Bullock v. Horn, 44 Ohio St. 420.]

<sup>9</sup> [Covell v. Washburn, 91 Cal. 560.]

thus exercise an option which belongs exclusively to the contractor.<sup>1</sup> The statute being that "the owner shall not be obliged to pay any greater sum or amount than the price stipulated and agreed to be paid by the contract," the remedy is against money due to the principal contractor for the work which he agreed to do, but which the sub-contractor or mechanic has actually performed for him. It does not extend to money payable to the contractor on any other account. Hence money agreed to be loaned, which is not a debt agreed to be paid on the work, is not liable. It is only the latter to which the statute refers.<sup>2</sup> In other words, the lien contemplated by the statute is for labor performed in conformity with the terms of the contract; and for the labor so performed a lien may be acquired to the extent of the contract price. A promise by the owner to the contractor to pay him a sum of money for damages, which the contractor had sustained during the progress of work, is a matter independent of the contract, and would form no part of the contract price. Even if such a promise could be enforced by the contractor against the owner, its non-fulfilment would not give sub-contractors a lien upon the building to the extent of that sum.<sup>3</sup> So where the owner is authorized to "retain out of his subsequent payments to the contractor," and the plaintiff may recover "to the extent in value of any balance due by the owner to his contractor under the contract with him," a sub-contractor or other claimant can acquire a lien only on such a demand as a debt arising out of the actual performance of the contract, and not on unliquidated damages which have accrued to the contractor by reason of a violation of the contract on the part of the owner.<sup>4</sup> If public policy or the just interests of laborers and mechanics require that the remedy should be extended so as to embrace the case of money agreed to be advanced otherwise than as payment by a party contracting to have a building erected, or damages for breach of contract, the legislatures must provide for such cases by express enactments.<sup>5</sup> So, although a statute may exist, authorizing a court to make extra allowance of damages in "the foreclosure of a mortgage," or "proceedings to compel the determination of claims to real property," and although proceedings to foreclose a mechanics' lien may be con-

<sup>1</sup> *Linn v. O'Hara*, 2 E. D. Smith (N. Y.), 560.

<sup>2</sup> *Loonie v. Hogan*, 5 Seld. (N. Y.) 435; s. c. 2 E. D. Smith, 681.

<sup>3</sup> *Nolan v. Gardner*, 4 E. D. Smith, 727; *Dennistoun v. McAllister*, Id. 729.

<sup>4</sup> *Miner v. Hoyt*, 4 Hill (N. Y.), 193; affirmed on appeal, s. c. 7 Hill, 525.

<sup>5</sup> *Loonie v. Hogan*, 2 E. D. Smith, 681.

sidered to be analogous to a foreclosure of mortgage, yet no such allowance can be made without more specific declaration of statute.<sup>1</sup> Where work has been done by contract, the laborers can never impose upon the owner of the work any higher duty or further payment than he by his contract has imposed on himself.<sup>2</sup> The amount of all liens for contractor, sub-contractors, and others cannot exceed the amount of the owner's original contract.<sup>3</sup> If, however, it appears that the written contract was not intended to include the entire work, or it is ambiguous and uncertain, the workman can recover beyond the estimate named in the writing.<sup>4</sup> When the owner completes the contract at the contractor's expense, the sub-contractor's claim is the difference between the entire cost to the owner and the contract price if the latter is the larger. "The defendant agreed with one Wilson to pay him \$3500 for building a house, the payments to be made in instalments as certain stages in the process of the building were reached. She paid Wilson \$1500 during the progress of the building, and the court finds that upon the date named in its finding \$400 more were due him under the contract. She refused to pay that amount, and claimed the work was not advanced far enough, and was not done in accordance with the contract. The court found against her on these points, and there is evidence to sustain such finding. The contractor upon defendant's refusal to pay neglected to go on with the work, when she served a notice upon him stating that as he had announced he had abandoned the work, and as he had stopped work, she thereby required him to proceed with the execution thereof within two days, and if he failed to do so, she should consider that he had abandoned the work, and she would proceed herself to finish the erection of the building and hold him for damages. Wilson did not proceed, and she went on and finished the building at an expense of \$1430, which with the \$1500 paid, left a balance of \$570 of the original contract price. The plaintiff and some of the defendants are sub-contractors, and filed liens and have recovered judgments for the payment to them of their liens out of the above \$570, to the extent to which it will go. Four hundred dollars were due Wilson when he demanded it for work which he had already done, and the owner's refusal to pay was wrongful. This is the finding of the court. There can be no question but

<sup>1</sup> *Randolph v. Foster*, 4 Abb. Pr. (N. Y.) 262.

<sup>2</sup> [*Herrin v. Warren & Mobley*, 61 Miss. 509; see §§ 61, 62.]

<sup>3</sup> [*Teahen v. Nelson*, 6 Utah, 363.]

<sup>4</sup> [*Tobin v. Collier*, 39 Ill. App. 478,

that such sum of money should be paid the lienors in this proceeding, as a payment *pro tanto* for the work done by them on the building, and which the plaintiff has the benefit of, because that sum at least was due Wilson at the time he demanded it, and which the owner has never paid. More difficulty exists in relation to the \$170. But we think, upon the whole, it should be allowed the lienors, and such allowance simply makes the owner liable for the contract price of the building, which she agreed to pay Wilson. We think the defendant, in effect, went on under her notice above mentioned, and completed the building at the expense of the contractor Wilson, and he by his silence must be held to have acquiesced in such action. She could claim no forfeiture of the contract, because he did not go on after her notice, for the reason that she herself was in the wrong, and had no right to insist upon his continuing work while she refused to pay the \$400, which were due the contractor at the very time when she gave this notice. Rather than pay that sum when it was due, she preferred to try and make the contractor go on with the work without it, and when she notifies him of the consequences of his refusal, that she will go on and complete the building and hold him for damages, it is but another way of saying that she will complete it at his expense, in which he acquiesces. She does complete it, and for \$170 less than it would have cost had she paid Wilson the \$400 when due him, and he had gone on and completed it. She could not put the contractor in default for his neglect or refusal to proceed and complete the building, because she herself was in default in refusing to pay him the \$400 when due. Under all the circumstances we think it fair to treat her as if the contractor had consented to her going on and completing the building at his expense up to the amount of the contract price."<sup>1</sup>

§ 212. **Owner not answerable in Personal Judgment to Sub-contractor.**—As the responsibility of the property of an owner to respond to the claims of sub-contractors and others dealing with the original contractor does not arise out of any privity of contract, or direct act of the owner, but rests solely upon express statute,<sup>2</sup> the extent to which the law has secured these claims has been, as we have seen, to grant either a lien upon the premises for the entire work and materials expended at the instance of the contractor, irrespective of the state of the account between the latter and the owner, or a lien to the extent that there may

<sup>1</sup> [Graf v. Cunningham, 109 N. Y. 369, 371, 373]

<sup>2</sup> Greenway v. Turner, 4 Md. 296.

be funds in the hands of the owner and due to the contractor, or simply a right of action for this balance. No legislature has gone so far as to constitute the contractor such an agent that he may bind the owner personally, and subject him to a general personal judgment for sums in excess of his contract. In jurisdictions where the first system prevails,<sup>1</sup> "every building . . . shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same;" the contractor can only pledge the building for the work and materials entering into it, and that at their fair market price.<sup>2</sup> The judgment is exclusively against the premises improved, and neither against other property, nor *in personam* against the owner.<sup>3</sup> Under the second class, where it is enacted that the above-named persons shall "have a lien for the value of such labor and materials upon such house . . . to the extent of the right, title, and interest at that time existing, of such owner, in the manner and to the extent hereinafter provided, but such owner shall not be obliged to pay for or on account of such house, . . . in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract," the owner is not personally liable by contract to the sub-contractor. No judgment can be ordered against him personally in excess of the amount due by him to the contractor. Still less can such judgment be sustained against a grantee of the owner, who is a party to no contract with the sub-contractor, relating to the matter.<sup>4</sup> Such a judgment would be reversed on appeal.<sup>5</sup> The above statute gives only the right to acquire a lien upon the right, title, and interest of the contracting owner existing in the property at the time of filing of notice,<sup>6</sup> and the proceeding is a mere foreclosure of the lien upon his interest in the premises, to culminate in a judgment directing the sale of such interest and title for the payment of the amount due to the claimant with costs.<sup>7</sup> The filing of a mechanics' lien for work or materials furnished upon the order of the owner of a building, does not release the owner from personal liability for such labor or materials, or take away from the person so furnishing the same the character of a creditor, within the meaning of a stipulation for the assent of all the creditors of such owner to a

<sup>1</sup> Pennsylvania.

<sup>2</sup> *Lee v. Burke*, 66 Penn. St. 336.

<sup>3</sup> *Anshutz v. McClelland*, 5 Watts (Penn.), 487; *Holden v. Winslow*, 19 Penn. St. 449.

<sup>4</sup> *Quimby v. Sloan*, 2 Abb. Pr. (N. Y.) 93.

<sup>5</sup> *Walker v. Paine*, 2 E. D. Smith, 662.

<sup>6</sup> *Cox v. Broderick*, 4 E. D. Smith, 721.

<sup>7</sup> *Walker v. Paine*, 2 E. D. Smith, 662.

composition agreement.<sup>1</sup> Forbearance by a sub-contractor to file a claim for a lien to which he supposes himself entitled upon a building for which he has furnished materials, is a sufficient consideration for a promise by the owner to pay the amount due, although it afterwards appears that the promisee was not entitled to a lien.<sup>2</sup> Personal liability of the owner is not necessary to a lien. One who furnishes materials to a contractor may have no personal action against any one but the contractor, and yet be able to enforce a lien against the owner.<sup>3</sup> The owner is personally liable to a sub-contractor in Indiana, but the statute is confined to the owner, and does not make one not the owner personally liable to the sub-contractor, although he was personally liable with such owner to the principal contractor.<sup>4</sup>

§ 213. **Statute of Frauds.**<sup>5</sup>—How far an owner may become responsible personally on his parol promise to pay for work and materials furnished to his contractor has been generally decided in accordance with the prevailing rules governing other decisions under the Statute of Frauds. Thus, where an owner promised to pay, before they were supplied, for work done and materials furnished to his contractor towards the erection of his building, it was an original undertaking, and not a promise to pay the debt of another.<sup>6</sup> So, where a lien is given upon a "contract entered into with the owner of any building," a promise to pay for the materials, in consideration they should be furnished to the contractor, is an original undertaking, and will sustain a general judgment.<sup>7</sup> But a verbal promise of the owner to pay the previous debt of the contractor to the material-man is within the Statute of Frauds if the owner owes nothing to the contractor, and is void, even though the material-man forbore in consequence of it to file any lien. If, however, the owner was indebted to the contractor, it will be a promise to pay his *own* debt to a third person, or if the material-man *expressly* agreed to waive his lien in consideration of the owner's promise, it will be good, although the owner owes the contractor nothing.<sup>8</sup> Where a sub-contractor was about to abandon his work because he was apprehensive the principal contractor would not pay him, or for other good and sufficient reason, and that to prevent this

<sup>1</sup> [Artman v. Truby, 130 Penn. 619.]

<sup>2</sup> [Hewett v. Currier, 63 Wis. 386.]

<sup>3</sup> [Lumber Co. v. Gottschalk, 81 Cal. 642; Kellogg v. Howes, 81 Cal. 170; Covell v. Washburn, 91 Cal. 560.]

<sup>4</sup> [Crawford v. Powell, 101 Ind. 421, 424.]

<sup>5</sup> This section was cited with approbation in Pool v. Sanford, 52 Tex. 621.

<sup>6</sup> Holmes v. Shands, 26 Miss. 639.

<sup>7</sup> McDaniel v. Weaver, 14 Ind. 517.

<sup>8</sup> [Parker v. Dillingham, 129 Ind. 542.]

he was induced by the owner to continue and complete his part of the work, this was held to be sufficient consideration to take the case out of the Statute of Frauds.<sup>1</sup> In those States where the building of the owner is liable for the payment of all the debts contracted for its erection, a parol promise to pay on his part, even subsequent to the furnishing of the materials, will be enforced. It has been there said that a past consideration flowing from a benefit conferred would support an express promise, — in other words, that a benefit derived from the unsolicited services of another creates a moral obligation to compensate that other, — and though not enough without a previous request to give rise to an implied, it is sufficient to sustain an express, assumption; and unless some equitable consideration is presented, it is immoral and unjust for the defendant to enjoy the property of another without paying him for it. If the owner's contract was a direct and absolute engagement to pay on a consideration moving to himself, or if at the time the promise was made, though subsequent to the furnishing of the materials, the plaintiff's claim was a lien on the house, it was the debt of the owner's own building, the payment of which could legally be enforced against it; and though it may not have been personally his debt, his property was answerable for it, and his engagement to pay was in relief of his property, and therefore not "a promise to answer for the debt or default of another."<sup>2</sup> But where the party purchasing materials is not the agent of the owner, or there is no lien by statute on the premises to answer for their payment, or no funds in the hands of the owner due to the party who purchased them, a promise to pay, after the sale, is not binding on the owner, unless reduced to writing, with a consideration expressed.<sup>3</sup> Such a promise to pay, if by parol, is void by the Statute of Frauds, unless the owner was indebted to the contractor. A parol promise to accept an order or a parol acceptance cannot be the ground of an action. The claimant might, however, make use of such promise as an implied admission on the part of the owner that something was due on the contract, but the owner would not be thereby precluded from proving in his defence that in fact nothing was due from him to the contractor.<sup>4</sup> Where a parol statement by the owner to a sub-contractor, who refused to finish his work, was, "Finish the plastering, and I will see you paid," the obligation of the contractor to complete the house and pay the sub-contractor not

<sup>1</sup> Pool v. Sanford, 52 Tex. 621.

<sup>2</sup> Landis v. Royer, 59 Penn. St. 95.

<sup>3</sup> McDonnell v. Dodge, 10 Wis. 106.

<sup>4</sup> Pike v. Irwin, 1 Sandf. (N. Y.), 14.



being released, it was held to be within the Statute of Frauds. Nor did the fact that there was a sum sufficient to pay the balance to contractor take the promise out of the statute.<sup>1</sup> So a parol promise by the vendor of a lot to pay for materials which had been furnished to the vendee is within the Statute of Frauds and void; likewise a parol promise by the former to accept a bill drawn on him by the latter for such materials.<sup>2</sup> But a promise on a valid consideration by a vendor of land, who takes a reconveyance, that he will pay for materials used in building a house on the land, it has been held, will entitle the party who furnished the materials to enforce the lien against the land.<sup>3</sup>

§ 214. *Interest.* — Claims for which mechanics may have liens are as much entitled to draw interest, after they become due, as others.<sup>4</sup> Interest, being an incident of the principal sum found due and withheld by unreasonable delay of payment, is properly allowed and secured by the lien.<sup>5</sup> It is not necessary for the recovery of such interest to bring a separate suit, or take a separate judgment, but the same may be computed on a lienable demand, and a lien awarded for the entire amount.<sup>6</sup> Where the articles are furnished for cash, interest is chargeable from the date of the delivery of the last article.<sup>7</sup> Interest should be allowed on a mechanics' lien claim from the time of filing the claim for record.<sup>8</sup> In another case it was held that interest, even if not claimed in the certificate filed with the clerk, nor in the petition, will nevertheless be computed upon the debt from the filing of the petition to the time of judgment, and upon the judgment to the time of satisfaction.<sup>9</sup> But when a credit is given by note, interest is not allowable until after the time in which the note had to mature, has expired.<sup>10</sup> It is a rule, however, in the construction of statutes, that the expression of one thing is sometimes to the exclusion of another; and so when a legislature has enumerated a variety of cases in which creditors shall be allowed to receive interest, it may safely be assumed that it was not intended to permit them to receive it in the cases not enumerated. Thus, where the only clause of a statute on the subject of interest in cases of an open account, where the items are unliquidated and uncertain in amount, is, that it is

<sup>1</sup> *Birchell v. Neaster*, 36 Ohio, 331.

<sup>2</sup> *Loonie v. Hogan*, 5 Seld. (N. Y.) 435.

<sup>3</sup> *Adams v. Russell*, 85 Ill. 284.

<sup>4</sup> *Willamette v. Riley*, 1 Oreg. 183.

<sup>5</sup> *Merritt v. Pearson*, 76 Ind. 44.

<sup>6</sup> *Willamette v. Riley*, 1 Oreg. 183.

<sup>7</sup> *Smith v. Shaffer*, 50 Md. 132.

<sup>8</sup> *Trustees Ger. Luth. Ch. v. Heise*, 44 Md. 454; [*Casey v. Weaver*, 141 Mass. 230.]

<sup>9</sup> *Johnson v. Boudry*, 116 Mass. 196.

<sup>10</sup> *Lutz v. Ey*, 3 E. D. Smith, 621.

allowed on money "withheld by an unreasonable and vexatious delay of payment," a purchaser of property is not liable for interest on the amount of repairs chargeable to him from the time the work was completed, nor from the time when his personal liability may be declared by a court, but only from the time when, by reference to and report of a master or other officer, such amount is ascertained.<sup>1</sup> But, where a penalty of twenty per cent on the cost of labor was imposed in case of non-payment of certain public assessment for which this lien was made applicable, it was held that the lien covered the penalty.<sup>2</sup> A debtor may agree to pay interest on a demand secured by mechanics' lien as well as upon any other, and whatever its effect among creditors, the debtor can raise no objection.<sup>3</sup> The owner paying judgments establishing liens conclusive against the contractor and his sureties, is entitled to interest from the date of the payment.<sup>4</sup>

<sup>1</sup> *Watkins v. Wassell*, 20 Ark. 410.

<sup>2</sup> *Wilvert v. Sunbury*, 81\* Penn. 57.

<sup>3</sup> *Clear Creek v. Root*, 1 Colo. 374.

<sup>4</sup> [*McFall v. Dempsey*, 43 Mo. App. 369, 377.]

## CHAPTER XIX.

WHEN LIEN IS ACQUIRED.<sup>1</sup>

§ 215. **Depends on Statute.**<sup>2</sup>—The time when the lien is to be considered as acquired depends essentially upon the provisions of the law authorizing this remedy. Independent of statute, no lien exists by virtue of labor or materials furnished in the erection of buildings, and, consequently, — where no fraud is alleged to have been contrived by the parties to prevent a lien, which might become the ground of relief in equity, under a distinct head of equity jurisdiction, — no inchoate lien, upon any general view of the equities of mechanics, can be claimed to operate at an earlier period than is expressly provided by law.<sup>3</sup> The period fixed has not been uniform in the several States. The larger number have established the commencement of the work upon the premises as the moment when the rights of the mechanic are to be protected; others have made the filing of a notice, in some public office of the jurisdiction where the building is situated, of intention to hold a lien, the time when it will attach; while a few have adopted the date of the contract or the completion of the work. To determine which of these periods is the most consonant with sound policy, much depends upon the favor with which it is the interest of the State to regard the claims of mechanics. If it be the intention to offer them a real protection, the commencement of the work is the period from which the lien should date. In adopting this time, no injustice is done the public. The work itself is notice to all of the mechanics' claims. If the lien is to take effect only from filing notice in a public office, the mechanic, when dealing with the designing, may in every instance be deprived of the security by intervening mortgages and judgments. It is no answer that the mechanic may give notice as soon as he commences work. There is nearly always, at the inception of the enterprise, a confidence on the part of the mechanic that the owner will, upon a fair completion

<sup>1</sup> See Chapters XX. and XXIX.

<sup>2</sup> This section was cited with approbation in *Chadbourn v. Williams*, 71 N. C. 449, 450.

<sup>3</sup> *Quimby v. Sloan*, 2 Abb. Pr. (N. Y.) 93; s. c. 2 E. D. Smith, 594.

of his contract, pay the stipulated price; and a party not only hesitates, as showing a want of this confidence, to lay a lien upon a house, when the owner has, as far as the work has progressed, promptly met his engagements, but it would be ruinous to his business in ordinary transactions, by deterring many honest men from contracting with one whom they knew in advance would unnecessarily encumber their property with this lien. In the large majority of instances in real life, these considerations prevail with the mechanic, and as long as the person with whom he has contracted responds to his obligations he files no lien. When the commencement of the building is adopted as the inception of the lien, the mechanic is secured, without being forced to display this want of confidence, which usually would embitter the parties, and render their subsequent dealings, in the completion of the contract, otherwise than harmonious. So far as the security of the lien against the owner himself is concerned, it is immaterial when it should begin; it is only important in contests for priority, as against the creditors, mortgagees, and grantees of the debtor; and it has been expressly held that a decree giving a mechanics' lien from a day previous to the time allowed by law will not, as to the owner, be reversed on that ground alone, but is erroneous if the rights of third persons be affected by it.<sup>1</sup> It is almost entirely in contests for priority that the question of its period of acquisition has been adjudicated.<sup>2</sup>

§ 216. **Commencement of Building.**<sup>3</sup>—Where it was provided that the building should be subject to the payment of the debts of mechanics, etc., “before any other lien which originated subsequent to the commencement of the said house or other building,” the period when the lien is acquired relates to the commencement of the building, and not to the time of the delivery of the materials.<sup>4</sup> When the lien shall be preferred “to every other lien which shall attach upon any property made subject thereto subsequent to the time when the work was commenced,” the effect is to give the lien from the date of the commencement of the labor.<sup>5</sup> So, where a lien shall be preferred to “all encumbrances that attach subsequent to the commencement of the building,” a lien of a mechanic who furnishes materials for a building will prevail over an encumbrance executed after the building is commenced, but before the materials are furnished.

<sup>1</sup> Nibbe v. Brauhn, 24 Ill. 268.

<sup>2</sup> See Chapter XX.

<sup>3</sup> Sections 216–219 inclusive were cited with approbation in Welch v. Porter, 63 Ala. 231.

<sup>4</sup> Browne v. Smith, 2 Browne (Penn.), 229.

<sup>5</sup> Keystone v. Gallagher, 5 Colo. 27.

The court said, there is certainly nothing inequitable in subjecting this mortgaged property to the payment of the debt contracted for these materials, of which the purchaser has the benefit. On the contrary, it is highly just that those who by their labor or materials have given real value to an unfinished building, which otherwise might never have been finished, should be considered as creditors of the building, and paid out of the proceeds of a sale of it, in preference to creditors whose encumbrances attach after the building has been commenced. Such laws are not unconstitutional, — they deprive no one of his property, but, on the contrary, secure to every one what is justly due to him, giving each one priority of right in the property, according to the claims of natural justice.<sup>1</sup> When the lien is made to attach from the commencement of "the building, erection, or other improvement," it attaches from the commencement of the building, and takes precedence over a mortgage executed after that time, although the particular work for which the lien is claimed was not commenced until after the execution of the mortgage.<sup>2</sup> So, when "the liens created shall relate to the time when the person furnishing materials began to furnish the same, and shall have priority over all liens suffered or created thereafter, except other mechanics' and material-men's liens, over which there shall be no priority," a fair construction of this law is, that the lien of the mechanic relates to the time when the work commenced or the materials began to be furnished, as to subsequent conveyances, as well as to other liens.<sup>3</sup> So in Colorado the lien begins with the commencement of work or furnishing materials.<sup>4</sup> So in Maryland a mechanics' lien relates to the commencement of the building.<sup>5</sup> Under a law which gives a preference to mechanics' liens for machinery over "all liens subsequent to the commencement of the work," the lien of a machinist commences as soon as he begins to put up the machine, and is preferred to subsequent liens and encumbrances only, and not to those which are coeval or simultaneous.<sup>6</sup> A mechanics' lien cannot date from a time when the defendant owner had no title or interest in the property, though the work may have been then actually begun.<sup>7</sup>

<sup>1</sup> *Dubois v. Wilson*, 21 Mo. 213; *bub v. Estate of Hornung*, 127 Ind. 182; *[Hydraulic Press Brick Co. v. Bormans]*, 19 Mo. App. 664, 666, 668; *Great Western P. M. Co. v. Bormans*, Id. 671.]

<sup>2</sup> *Neilson v. Iowa Eastern R. R. Co.*, 44 Iowa, 71; *Delaware v. Davenport*, 46 Iowa, 412.

<sup>3</sup> *Fleming v. Bumgarner*, 29 Ind. 424; *Kellenberger v. Boyer*, 37 Ind. 188; *[Good-*

*Teahen v. Nelson*, 6 Utah, 363.]

<sup>4</sup> *[Tritch v. Norton]*, 10 Colo. 337.]

<sup>5</sup> *[Rosenthal v. Md. Brick Co.]*, 61 Md. 591.]

<sup>6</sup> *Denmead v. Bank of Balt.*, 9 Md. 185.

<sup>7</sup> *[Steininger v. Raeman]*, 28 Mo. App. 594; see § 224.]

§ 217. *Same.* — Again, where “the liens created by this act shall be preferred to every other lien or encumbrance which shall have attached upon the said property subsequent to the time at which the work was commenced or the materials furnished,” the lien of the contractor or material-men dates from the commencement of the work.<sup>1</sup> Where a law declares that the lien “shall attach and be preferred to all other incumbrances . . . subsequent to the commencement of such building,” etc., and in another section of the same statute prescribes the time in which such claim of lien shall be preferred, namely “on the filing of a true account,” and that the “statement of account, when so filed, shall be a lien,” the lien attaches from the commencement of the building, but is inchoate until the claim is filed, and if not filed within the time prescribed by statute, the lien is lost.<sup>2</sup> All persons who deal with the property during the progress of the work are charged with notice of the claim of the contractor. But if, after informing themselves of the nature and amount of the contractor’s claim, they take a conveyance of the property subject to it, the parties cannot by a subsequent contract, or by an alteration in the existing contract, deprive them of the benefit of their purchase, by creating an encumbrance on the property which was not contemplated in the original contract.<sup>3</sup> The question frequently is, whether or not the word “furnished,” as used in the statute, means “delivered at the building” in the construction of which the materials are furnished. This has been held not to be its reasonable construction. The material-man is properly said to have “furnished” the materials when he has delivered, or has them ready for delivery, at the place where he has agreed to deliver them under the contract; which in this case was at the plaintiff’s foundry, some distance from the quartz-mill.<sup>4</sup> In a subsequent case it was decided to commence and attach to the property at the time of the commencement of the work, or the beginning to furnish the materials.<sup>5</sup> So in Texas the lien of a mechanic, though not fixed before registry of the contract or bill of particulars, yet when it is fixed, relates back to the time when the work was performed or the material furnished, and takes precedence of all claims on the property being improved, which have been fastened on it since that time.<sup>6</sup> Under the Massachusetts Pub. Stats., c. 177, § 1, a mechanics’

<sup>1</sup> *Cahoon v. Levy*, 6 Cal. 295; [*Charles-ton L. & M. Co. v. Brockmyer*, 18 W. Va. 586, 591.]

<sup>2</sup> *Welch v. Porter*, 63 Ala. 229.

<sup>3</sup> *Soule v. Dawes*, 7 Cal. 575; *Crowell v. Gilmore*, 13 Cal. 54.

<sup>4</sup> *Tibbetts v. Moore*, 23 Cal. 208.

<sup>5</sup> *McCrea v. Craig*, Id. 522; *Tuttle v. Montford*, 7 Cal. 358.

<sup>6</sup> [*Trammell & Co. v. Mount*, 68 Tex. 210; *Keating Implement Co. v. Marshall Elec. L. Co.*, 74 Tex. 605.]

lien has precedence over any other lien which originates after the work has begun, hence over a mortgage given after the work has begun.<sup>1</sup> In North Carolina, upon the filing of the notice within the time and in the manner prescribed by the statute, the lien given mechanics and laborers attaches to the property upon which the labor or materials have been bestowed, and has relation back to the time of the beginning of the work or furnishing the materials; and is effectual, not only against all other liens or encumbrances which attached subsequently, but against purchasers for value, and without actual notice.<sup>2</sup> Under the Nebraska law a material-man's lien, upon filing the proper account, dates from the delivery of the first material, although the account and affidavit do not name that time.<sup>3</sup> When there is nothing in a claim filed to show when the building was commenced, the lien is held to date from the filing of a lien in a contest for priority between mortgagees and the lien holder.<sup>4</sup> In a similar case, it was held, where the liens have precedence over all other liens after commencement of the building, it should appear in the *proceedings* when the building was commenced, to determine when the liens attached. If it nowhere appears when the liens attached, the judgment would operate as a lien upon the premises as an ordinary judgment from the time it was docketed.<sup>5</sup>

§ 218. **When Building is commenced.**—When the lien is thus given, “the commencement of the building” of a house is the first labor done on the ground, which is made the foundation of the building, and to form part of the work suitable and necessary for its construction. That this construction is the most favorable for those who furnish materials and perform work in the erection of houses, for whose security and advantage the act was exclusively designed, can admit of no doubt; for they thereby gain a preference over all other liens of posterior date to the commencement of the building, although prior to the time of furnishing the materials, or even contracting for them, and of performing the work. It is not the commencement of the right of ownership or claim to the property, nor yet the time at which such right may be first exercised in contracting for materials and with mechanics for the purpose of continuing the building, that is to fix and regulate the commencement of the liens on behalf of those furnishing materials and performing the work;

<sup>1</sup> [McDonald v. Kelly, 14 R. I. 335.]

<sup>2</sup> [Burr v. Maultsby, 99 N. C. 263.]

<sup>3</sup> [Courtney v. Ins. Co., 49 Fed. R.

309; Stewart-Chute Lumber Co. v. M. P. R. Co., 28 Neb. 39.]

<sup>4</sup> Reading v. Hopson, 90 Penn. 494.

<sup>5</sup> Kendall v. McFarland, 4 Oreg. 292.

nor is it the time of furnishing the work, but the time of commencing the building of the house, that gives date to the lien.<sup>1</sup> In like manner it has been held, where the lien dates from "the commencement of a building," the excavation for the foundation is the commencement, within the meaning of the lien law. This excavation is the constructive notice intended by the legislature to all who might propose either to purchase or to acquire liens upon the property.<sup>2</sup> So in Kansas under a law giving mechanics' liens priority over "all other liens and encumbrances" attaching "subsequent to the commencement of the building," it is held that the excavation of the cellar is the "commencement" referred to, and the lien of him who furnished the lumber is prior to a mortgage executed after the cellar was begun, but before the sale and furnishing of the lumber.<sup>3</sup> So, where a lien upon machinery for its building has preference over all "liens or encumbrances which attach subsequently to the commencement of its building," the lien commences at least as soon as the mechanic begins to put it up, or, if it be a house, as soon as the house is begun.<sup>4</sup> Where the language of the law was that a mechanic or material-man may have a lien upon the building, which lien shall take precedence of any other lien, "which originated subsequent to the laying of stock or to the commencement of such house," to give the mechanic a preference over a mortgagee, he must show that his material, either in part or whole, was on the mortgaged premises, or that they had commenced labor in some manner upon the premises previous to the record of the mortgage. The means here provided for the mortgagee to know if he might safely make his transaction were an ocular examination of the premises, in order to see if stock had been laid, or work and labor commenced. If this had not been done, he might safely conclude that no builder's lien had attached.<sup>5</sup> The "laying of stock" means the beginning of the work by placing the material for the structure on or adjacent to the land upon which it is to be erected. From this fact, notice is chargeable upon any one who shall take a subsequent lien, by mortgage or otherwise, upon the land. It has the same effect, in point of notice, that the possession of land carries of an adverse claim. It would be very unjust, and have the effect of deterring any one from advancing money upon such security, if the land could be after-

<sup>1</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

<sup>2</sup> Mutual Ben. L. C. v. Rowand, 26 N. J. Eq. 389.

<sup>3</sup> [Thomas & Co. v. Mowers, 27 Kan. 265.]

<sup>4</sup> Wells v. Canton Co., 3 Md. 234.

<sup>5</sup> Farmers' Bank v. Winslow, 3 Minn. 86.



wards swallowed up by a mechanics' lien for some matter which had not been commenced, and of which the lender had no notice at the time of his loan; and therefore a mortgage, which was executed and recorded before the party who claimed a lien had "laid his stock," took precedence of the lien as the prior encumbrance upon the land.<sup>1</sup> Merely laying the ground off for the building, and driving some pegs in the ground in laying it off, "is not the commencement of the building." If this were so, the same thing might be said of the mental labor of selecting the location, designing dimensions, and the mechanical work of measuring the ground and drawing plans of the building on paper; all of which would leave no patent and plainly visible trace of work and labor on the ground itself. This would open wide the door to innumerable frauds upon parties advancing moneys on mortgages to assist in building. What this law means is some work and labor on the ground, the effects of which are apparent, — easily seen by everybody; such as beginning to dig the foundation, or work of like description, which every one can readily see and recognize as the commencement of a building.<sup>2</sup> Where the sale of property under the lien "shall convey the estate of the owner, subject to all mortgages created and recorded or registered prior to the commencement of the building," the lien dates not from the time of doing the work or furnishing the materials, but from the commencement of the building, and therefore, where the evidence was that the only work done before the recording of a mortgage, was "marking on the rods the length and width of the window frames," but which were not made until four days after recording the mortgage, it was held that the mortgage had priority.<sup>3</sup> Again, where a party contemplating purchase drove stakes to indicate the line of foundation and at one corner dug or scraped away the dirt down to a level, the whole work occupying but a part of a day, and, about three weeks subsequently, purchased, executing a mortgage for advances to be made, the whole being one transaction, it was held that the mortgage had priority over a lien which dates from the commencement of the work.<sup>4</sup> It seems that the putting of a new fencing around a dilapidated building in pursuance of a contract for extensive repairs to the house, which contract included the fence, will not be deemed a sufficient commencement of work, as against a *bona fide* mortgagee.<sup>5</sup> The

<sup>1</sup> Knox v. Starks, 4 Minn. 20.

<sup>2</sup> Brooks v. Lester, 36 Md. 65.

<sup>4</sup> Kelly v. Rosenstock, 45 Md. 389.

<sup>5</sup> Middletown Savings Bk. v. Fellowes,

<sup>3</sup> Taylor v. La Bar, 25 N. J. Eq. 222; 42 Conn. 36.  
Tompkins v. Horton, Id. 284.

clearing of the land of stumps, logs, etc., is not the commencement of building.<sup>1</sup>

§ 219. **Instances showing Commencement of Building.**—A change of plan of the house after it has been commenced, by enlarging or contracting, or in any other respect changing it, as long as the original design of its character is retained, cannot with propriety be said to change or give a new commencement to the building of the house.<sup>2</sup> As where the building was originally designed for a dwelling-house, and the design is carried into execution by finishing it as such within a reasonable time, there is no ground to assert that the commencement is any other than the original actual commencement of the building. But if a warehouse should be originally built and finished, and, after remaining some time in this situation, it should be converted into a dwelling-house, there the new work might be considered a new building.<sup>3</sup> So, when the plan of a building is changed and greatly enlarged while in the course of erection, it is a new commencement of the building.<sup>4</sup> Where the owner of land commenced to build, and ceased, paid off all the claims, and then sold, and the vendee began to finish, it was held that the commencement of the building, for those who claimed liens for work done under contract with the vendee, began with the re-commencement of the building, and not with the original building.<sup>5</sup> But the interruption of the work for a short period, and its subsequent resumption without a change of its original design and character, will not constitute a new commencement, or affect the attachment of the lien when the building was originally commenced.<sup>6</sup> The interruption of the construction of a building on account of the season of the year, though it be for months at a time, will not prevent the lien from attaching from the commencement of the building, if the construction be resumed without change of design and there is no evidence of the intention to prosecute the work.<sup>7</sup> So where the lien dates from "the commencement of the labor or furnishing of the materials," and materials are furnished from time to time for a particular purpose, — as the construction of a house, — and the dates are so near each other as to constitute one running account, the lien dates from the time when the first article was supplied, although, strictly speaking, the articles were not furnished under one

<sup>1</sup> [Central Trust Co. v. Cameron, I. & C. Co., 47 Fed. R. 136, *dictum*.]

<sup>2</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

<sup>3</sup> Hern v. Hopkins, 13 Serg. & R. 269.

<sup>4</sup> Norris's Appeal, 30 Penn. St. 122.

<sup>5</sup> Fordham's Appeal, 78 Penn. 120.

<sup>6</sup> Gordon v. Torrey, 2 McCart. Ch. (N. J.) 112.

<sup>7</sup> Manhattan Life Ins. Co. v. Paulison, 28 N. J. Eq. 304.

express entire contract. But where they are furnished for different purposes, as a part of them for constructing a house, and the residue at a subsequent time, for altering or repairing it; or where there are intervals of time in the account so long that it cannot with propriety be called one account, — there is not, in the absence of an entire contract, a lien for the whole from the date of the first article furnished. The items must be regarded as constituting two or more distinct accounts, as the case may be; and the materials supplied for constructing the house as making one account, and those subsequently furnished for repairing it as forming another.<sup>1</sup> When a statute provides that the lien shall attach and be preferred to all other encumbrances which may be attached to or upon such buildings, etc., subsequent to the commencement of such buildings, etc., a contractor or material-man acquires the lien when he commences the work. But where the contractor was to do the work only, and the materials are to be furnished by the owner, and, after the commencement of the work, the materials are furnished by a third person, under a separate and independent contract with the owner, the lien of the material-man does not relate back to the commencement of the building, so as to override the lien of a mortgage or other intervening encumbrance. It was said that to construe the above statute otherwise would work great injustice to a party who loaned his money on property when no contract or obligation existed against it.<sup>2</sup>

§ 219 *a*. **Same.** — The following cases will show the more recent decisions as to what constitutes a commencement of a building under the lien laws. When a lien dates from “the commencement of the building,” a building is commenced when the permanent work upon the ground, whether of excavation or construction, has progressed so far as to inform reasonable observers that it is designed for the erection of a building.<sup>3</sup> The commencement of a building is the first labor done on the ground which is made the foundation of the building and is to form part of the work suitable and necessary for its construction.<sup>4</sup> Under a law that “the lien shall be preferred to every other lien which attached upon such building and ground subsequently to the commencement of such building,” and the foundation for a furnace was commenced on July 16th, it was held entitled to preference over a mortgage made July 17th. The notice given by breaking the ground was notice of all that was intended to

<sup>1</sup> *Choteau v. Thompson*, 2 Ohio St. 114; see Chapter XXIX.

<sup>2</sup> *Welch v. Porter*, 63 Ala. 232.

<sup>3</sup> *Jacobus v. Mut. Ben. Life Ins. Co.*, 27 N. J. Eq. 604.

<sup>4</sup> *Conrad v. Starr*, 50 Iowa, 470.

be done in carrying out the contract.<sup>1</sup> Where work is done with the design to go on and construct a building, it must be regarded as the commencement of the building; but if foundation walls are put in, in order to make the land salable, and a sale is subsequently made to a purchaser who builds, the work begun by the purchaser is regarded as the commencement of the building, and not the original work by the owner.<sup>2</sup> Where a statute declared that "the lien shall relate to the time of the commencement of the work," it was held not to mean the commencement of the general construction of the building, but the commencement of the particular work of furnishing materials of which a particular person claims a lien.<sup>3</sup> When work commences is a question of fact to be determined by the evidence.<sup>4</sup>

§ 220. **Completion of Building.** — Under a law which gives the mechanic a lien relating back to the commencement of the building, it will not be prevented from relating back to that period by the mere fact that it has changed hands and passed to a new owner since its commencement. But it is equally plain that there should be some fixed period at which purchasers and encumbrancers may rest satisfied that their estates or securities are not to be cut out or over-reached, after their creation, by calling a mechanic to do additional work on a house which they regard as completed, and then allowing or procuring him to file a claim and proceed to judgment. The criterion would seem to be that everything done before the building is finished according to the original plan or design, whether agreeably to that plan or not, may be made the subject of a lien, which will relate back to the period when the building was commenced, to the exclusion of intervening encumbrances; but that when the plan of the builder has once been carried out, and the house finished in the way or style in which he designed it to be, no lien can attach for subsequent changes or alterations or additions by third persons, to whom it has been transferred by him, merely because they are useful or ornamental, nor unless they are absolutely essential to give the building completeness, and render it fit for the purpose for which it was erected. There can be no doubt that if a house, which had been roofed in and shingled in the ordinary manner, and finished in all other particulars, were sold, and a mortgage taken for the purchase-money, the purchaser ought not to have the power to defeat the title of the

<sup>1</sup> Parrish and Hazard's Appeal, 83 Penn. 111.

<sup>2</sup> Jean v. Wilson, 38 Md. 288.

<sup>3</sup> Barber v. Reynolds, 44 Cal. 533.

<sup>4</sup> Kelly v. Rosenstock, 45 Md. 389.

mortgagee by covering the shingles with tin; although the case might be different if the walls were not plastered at the time of the sale, or the building incomplete in any other material particular, because the superposition of the tin on the shingles would then be a change in the plan of an unfinished building, and not an addition to or alteration of one already finished. So long as any part of a building is incomplete, the whole is so, and may be moulded into any shape to suit the wishes of the owner, without excluding the alterations so made from the benefit of the lien law. But, after a house is finished and sold, a paper-hanger employed by the purchaser cannot have a lien for his work, and thereby affect the lien of a mortgagee for the purchase-money.<sup>1</sup>

§ 221. **Change of Ownership does not make New Commencement.** — The same proposition has been thus announced in other cases. As long as the design or use for which the house is intended shall continue to be the same, a change of ownership, after the building of it has been commenced, does not, and in the very nature of the thing itself cannot, change the commencement of the building of the house: that must still continue to be the same, notwithstanding the right of property in the ground, and the house begun upon it, shall have been changed subsequently, and passed through twenty or more different hands.<sup>2</sup> A change of ownership during the progress of the building does not make a new commencement of the building, nor affect the validity of the lien which attached at the commencement of the building. So that, in a dispute between a mortgagee and lien claimants as to the priority of their respective encumbrances on the mortgaged premises, where it was objected to the validity of the lien that the building was not erected by the owner of the land, nor by his consent, and it appeared that pending the erection of the building the owner had conveyed away the land, but that the conveyance was merely as collateral security for the payment of a debt due to the grantee, that the deed was intended simply as a mortgage, and that on satisfaction of the debt the land was reconveyed; it was held that these circumstances effectually disposed of the objection urged against the validity of the lien.<sup>3</sup> Where a lien law gives a mechanic a lien from the date the labor was commenced or the first of the materials fur-

<sup>1</sup> *McCree v. Campion*, 5 Phila. 9.

<sup>2</sup> *Pennock v. Hoover*, 5 Rawle (Penn.), 291; *Insurance Co. v. Pringle*, 2 Serg. &

R. 138; *Hern v. Hopkins*, 13 Serg. & R. 269.

<sup>3</sup> *Gordon v. Torrey*, 2 McCart. Ch. (N. J.) 112.

nished, the object of the law is to protect the mechanic against injury by alienation during the progress of the work. And where the work done or materials furnished is continuous in its character, the work must be regarded as an entirety, and the lien attaches for work done and materials furnished after as well as before a sale.<sup>1</sup> But when houses are finished sufficiently for particular purposes, such as warehouses or stores, and not for dwelling-houses, — and they may remain in this situation for years, and then are finished, — in such case the completion of the work may fairly be considered a new building, and not connected with the first part of the building, so as to give a lien from the original commencement. And where a building, partly finished, was bought at sheriff's sale by a party, and a deed was duly made and acknowledged to him, and the vendee finished the building, this was a new commencement of the building, and all liens existing then have no priority over mechanics who did work in completing the building for the vendee. For no two things, which in one particular are identical, can be more different than a private sale of property against which there are liens, and a public sale of the same property on execution by a sheriff. The first leaves it subject to all liens, precisely as before the sale, and puts the purchaser in possession, subject to them; the sheriff's sale divests all liens, ordinarily, and pays off all encumbrances, or delivers the property to the purchaser free and clear of them.<sup>2</sup>

§ 222. **Filing Notice.** — The mechanics' lien is occasionally made to date from the time the notice is filed. As where "the clerk shall file such account and affidavit in his office, and make an abstract therefrom in his judgment docket . . . which shall from that time constitute a lien upon such property," and also "the lien shall date and take effect from the time the lien of the mechanic is laid and taken and filed in the clerk's office, and an abstract thereof entered in the judgment docket, and not from any earlier period, unless the contract in respect of such work and labor and materials shall have been duly acknowledged or proved and recorded in the office of the clerk, . . . and in such case the lien shall be inchoate, and, if perfected within the time required by law, shall relate back and bind such property from the time such contract was filed for record;" if there be no registered contract, the mechanics' lien commences at the time that he files his sworn account in the clerk's office, and causes

<sup>1</sup> Mellor v. Valentine, 3 Colo. 235.

<sup>2</sup> Stevenson v. Stonehill, 5 Whart. (Penn.) 301.

an abstract to be entered in the judgment docket, and not before. If, before the lien be thus fixed, a third person obtains a valid title to the property by some legal mode of conveyance, and the mechanic has constructive notice thereof by registration of the conveyance or actual notice, the lien is defeated.<sup>1</sup> So, where the statute is that "any such person wishing to acquire such lien shall file notice of his intention to hold a lien upon such property," the lien does not attach until the notice is filed; and the mere fact that materials are furnished, or work done, does not alone constitute a lien.<sup>2</sup> Where the law gives to the materialman a lien "upon filing the notice with the county clerk," it is then, and not until then, the lien is acquired.<sup>3</sup> Where the law provides that the mechanic "shall file in the recorder's office," and "the recorder shall record the notice when presented, in a book to be kept for that purpose," etc., the lien is created by filing with the recorder notice of the intention to hold a lien, and not by the recording of the same.<sup>4</sup> It was provided that the lien "shall attach from the time of filing the claim:" this precludes the idea of its having effect by relation to disturb any rights, either legal or equitable, that may have been created prior to that time. Up to the time of the filing of such claim the property sought to be subjected to such lien may be dealt with in all respects as fully and freely as if it were not liable to be thus subjected.<sup>5</sup>

§ 223. **When no Period is fixed, Lien acquired when Work is done or Materials furnished.**—Under a statute that "any person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting any building, shall have a lien upon the land for the amount due to him for such labor or materials," the lien does not attach, unless it is otherwise provided for, until the work shall have been performed or the materials furnished for which the lien is claimed, and will therefore be postponed to a judgment which was obtained before any of the work was done or materials furnished.<sup>6</sup> In another case under the same statute, it was held that, unless it is otherwise provided, the mechanics' lien will attach from the delivery of the materials upon the premises, and the use of them by connecting them to the freehold, and not from the date of the con-

<sup>1</sup> *Loring v. Flora*, 24 Ark. 151; *Brackney v. Turrentine*, 14 Ark. 416; *Hicks v. Branton*, 21 Ark. 186.

<sup>2</sup> *Green v. Green*, 16 Ind. 253; affirmed in *Waldo v. Walters*, 17 Ind. 534; and *Milliken v. Armstrong*, Id. 456.

<sup>3</sup> *Quimby v. Sloan*, 2 Abb. Pr. 93; s. c. 2 E. D. Smith (N. Y.), 594.

<sup>4</sup> *Wilson v. Hopkins*, 51 Ind. 233.

<sup>5</sup> *Kenny v. Gage*, 33 Vt. 302.

<sup>6</sup> *McLagan v. Brown*, 11 Ill. 519.

tract. This is the most equitable construction, it was said, if the rights of others are to be regarded. By the delivery of materials, or the bestowal of labor upon the land, means are offered others to know something of such claims for the period that may follow, within which the lienor may assert his rights. Were the promise or contract for the material or labor the ground of lien, or even the bare commencement to deliver the one or bestow the other, no one could possibly have any means of knowledge; and the time for completion and payment might prolong this uncertainty for years. The reasonable ground on which to base the lien is, a debt, created by the performance of the benefit contracted for the land. It is immaterial whether that debt be due or not.<sup>1</sup> Where "every person who may wish to avail himself of the benefit of this act shall file with the clerk, etc., and within six months after such lien shall have accrued, a just and true account of the amount, etc., which is to be a lien on such building," the lien commences with the completion of the work or the delivery of the materials, the other requisites of the act being complied with. The lien, therefore, of a judgment recovered against the proprietor after the commencement of the work, and before its completion, is paramount to that acquired by the mechanic by filing his account, etc., — after the completion of the work, — his lien goes back only to the completion, and not to the commencement of the work.<sup>2</sup> Under a constitution which declares that "mechanics and laborers shall have liens upon the property of their employers for labor performed or materials furnished," it was held that the laborers' lien attaches from the time the work is done, and is not postponed until foreclosure.<sup>3</sup>

§ 224. **Making Contract.** — If the lien commence from "the time of making the contract," and it has been enforced by a sale of the land and building, in a controversy afterwards between the purchaser and an encumbrancer, as to which has priority, the commencement of the mechanics' lien will be held to be the date of the contract on which the proceedings to enforce it were founded, and not any prior act of furnishing materials or doing the work.<sup>4</sup> And if at that time the title of the party contracting be not in such a condition as to be subject to the lien, it will attach to the property upon the completion of the title to it, and postpone parties acquiring an interest under deeds of trust made

<sup>1</sup> Williams v. Chapman, 17 Ill. 423.

<sup>2</sup> McCullough v. Caldwell, 8 Ark. 231.

<sup>4</sup> Smith v. Otley, 26 Miss. 291; affirmed

in 27 Miss. 57.

<sup>3</sup> Camp v. Mayer, 47 Ga. 427.



after the commencement of the work.<sup>1</sup> The lien attaches from the time of the contract even against a mortgage executed in the period between the contract and the commencement of work under it, although the mortgagee had no notice actual or constructive.<sup>2</sup>

<sup>1</sup> [See also § 216.]

Clark *v.* Moore, 64 Ill. 273 ; Freeman *v.*

<sup>2</sup> [Stout *v.* Sower, 22 Ill. App. 65, 77 ; Arnold, 39 Ill. App. 216.]  
Paddock *v.* Stout, 121 Ill. 571, 580 ;

## CHAPTER XX.

PRIORITIES BETWEEN LIEN-HOLDERS AND PURCHASERS, MORTGAGEES,  
AND OTHERS.

§ 225. **Statement of General Principle.**<sup>1</sup> — The governing principle upon which the adjudications in contests for priority have been based is, that vested rights of purchasers or encumbrancers<sup>2</sup> and, reciprocally, the liens of mechanics, are not affected or displaced, when once attached, by other rights subsequently accruing.<sup>3</sup> The priorities of each are jealously protected from all hostile interference. The law imposes on mechanics, like other persons, the necessity to ascertain for themselves the nature of the interest, in the land to be improved, of the persons with whom they contract; and all negligence in this regard is charged to their own account. The contract must be with the owner or his agent,<sup>4</sup> or the plaintiff will fail as against a subsequent mortgagee, and mere evidence of possession by the contracting party is insufficient.<sup>5</sup> To allow the vested rights of third persons, not parties or privies to a contract, to be prejudiced by its terms, would be destructive of the rights of property,<sup>6</sup> and entirely at variance with the office of a lien, which is not to create an estate, or in the slightest degree affect or interfere with prior encumbrances. Its true function is to prevent subsequent alienations and encumbrances, except in subordination to itself.<sup>7</sup> It does not, however, prevent the sale or mortgage of the property, but only subordinates the latter to the former.<sup>8</sup> On the other hand, the lien of the mechanic, when once fixed, cannot be disturbed by any act of the debtor or his creditors.<sup>9</sup> To determine, therefore, priority among different lien-holders, it is only necessary to decide who has the first right or lien, unless it has been displaced by some act of the party

<sup>1</sup> This section was cited with approbation in *Mellor v. Valentine*, 3 Colo. 258.

<sup>2</sup> *Williams v. Chapman*, 17 Ill. 423.

<sup>3</sup> This proposition is not applicable to the liens of mechanics *inter se*. *Meehan v. Williams*, 2 Daly (N. Y.), 367.

<sup>4</sup> [*Folsom v. Cragen*, 11 Colo. 205, 208, citing *Phillips*, § 225.]

<sup>5</sup> [*Dierks Bros. v. Walrod*, 66 Iowa, 354.]

<sup>6</sup> *Brown v. Morison*, 5 Ark. 217.

<sup>7</sup> *Watkins v. Wassell*, 15 Ark. 73; *Spence v. Etter*, 8 Ark. 69.

<sup>8</sup> *Bryant v. Warren*, 51 N. H. 213.

<sup>9</sup> *Gale v. Blaikie*, 126 Mass. 274; *Amidon v. Benjamin*, 126 Mass. 276; *Justice v. Parker*, 12 N. W. R. 553.

holding it, which shall postpone him to subsequent claimants.<sup>1</sup> This may be either by agreement of parties, or fraud in its creation,<sup>2</sup> or such subsequent conduct that its assertion would operate as a fraud upon the rights of others. As where a deed was acknowledged and left for registration, but the tax was not paid on it, the vendor, who was insolvent, remained in possession of the lot conveyed, and employed a mechanic to build a house upon it. While the building was progressing, the vendees, aware of it, stood by and said nothing, the mechanic having no notice of their claim. It was held, notwithstanding any interest in the vendees, that the property was subject to the mechanics' lien.<sup>3</sup> Again, a company borrowed ten thousand dollars from a bank to complete its building and executed a deed of trust upon it to secure the loan. The company then entered into a contract with a mechanic to complete the building, and contracted to give him a deed of trust subject to the first deed. The company paid him eight thousand dollars of the money so borrowed, and executed the second deed of trust to him. It was held that the mechanic, having contracted with full knowledge how the money was to be raised, was equitably estopped from claiming against the deed of trust executed to secure the money loaned.<sup>4</sup> Mechanics asserting a lien upon real property for their work, and claiming a priority over mortgagees and others, who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien, and, where the statute requires it, such as when the work was commenced, the character of the work, and when it was completed, etc.<sup>5</sup> An agreement of the owner to pay ten per cent interest and attorneys' fees cannot increase the amount of a lien, as against those holding junior liens at the time of the said agreement.<sup>6</sup> A law giving miners a lien prior to all others executed before or after their work, is not in violation of sec. 1, art. 14, of the Federal Constitution in respect to the equal protection of the laws. This lien law enters into every mortgage as a term of it.<sup>7</sup>

*Purchasers and Mortgagees:—*

§ 226. **When Lien of Mechanic has Priority.**—In continuation of the discussion of the preceding chapter, as to when the lien of

<sup>1</sup> Parker v. Kelly, 18 Miss. 184; Wel-  
ler v. McNabb, 4 Sneed (Tenn.), 422;  
Twelves v. Williams, 3 Whart. (Penn.)  
485.

<sup>2</sup> Briggs v. Planters' Bank, 1 Freem.  
Ch. (Miss.) 574; Rutledge v. Smith, 1  
McCord, Ch. (S. C.) 119.

<sup>3</sup> Phillips v. Clark, 4 Met. (Ky.) 348.

<sup>4</sup> [Wroten v. Armat, 31 Gratt. 228.]

<sup>5</sup> Davis v. Alvord, 94 U. S. 545.

<sup>6</sup> [Bissell v. Lewis, 56 Iowa, 231.]

<sup>7</sup> [Warren v. Sohn, 112 Ind. 213, 218,

the mechanic is acquired, and with more especial reference to the priorities attaching thereto, it has been held, under a law which gives a lien "to be preferred to any other lien which originated subsequent to the commencement of the house or other building," that where an unfinished house was sold, and a mortgage given to secure the purchase-money, which was immediately recorded, and the vendee then went on with the building, the debts of the workmen and persons who furnished materials for the building, after the recording of the mortgage, were liens against the building, and preferred to the mortgage. The mere fact that it was finished by another person would not work a loss of lien, when it is clear that, if finished by the same person, no such effect would be produced. Under such a law, all that the workmen have to do is to search the records for liens existing before the commencement of the house, and a mortgage recorded afterwards is no legal notice to them.<sup>1</sup> So, under a statute making the lien date from "the commencement of the building," subsequent mortgagees will be postponed.<sup>2</sup> But, where the lien dated from the "commencement of work," and it not appearing on the record when work was commenced, it will not be presumed that it was commenced before a mortgage executed and recorded in the same year, so as to give to the lien priority over it.<sup>3</sup> Again, where a statute declared that the lien "shall not avail against any mortgage actually existing and duly recorded prior to the date of the contract," the lien has priority over a mortgage executed after the making of the contract.<sup>4</sup> A mechanics' lien is superior to all liens acquired after the work commenced, and to all prior liens of which the mechanic had no notice actual or constructive. He must take notice of a recorded mortgage.<sup>5</sup> The rule *caveat emptor* applies against a mechanic as well as against a vendee. Labor that goes into the production of property is in the nature of purchase-money, and takes precedence even of a trust debt.<sup>6</sup> Under the Georgia code a laborer's lien is "superior to all other liens, except liens for taxes, special liens of landlords on yearly crops, and *bona fide* purchasers without notice of an unforeclosed statutory lien." And it takes precedence of a mortgage executed before or after the labor, unless it antedated the lien law itself.<sup>7</sup> The Connecticut law gives a mechanics' lien

<sup>1</sup> American Fire Ins. Co. v. Pringle, 2 Serg. & R. 138.

<sup>2</sup> Hall v. Hinckley, 32 Wis. 362.

<sup>3</sup> Davis v. Alvord, 94 U. S. 545.

<sup>4</sup> Batchelder v. Rand, 117 Mass. 176.

<sup>5</sup> [Tritch v. Norton, 10 Colo. 337, 354,

citing Phillips, § 232; Folsom v. Cragen, 11 Colo. 205.]

<sup>6</sup> [Boynton, Ad. v. Westbrook, 74 Ga. 68, 70.]

<sup>7</sup> [Allred v. Haile, 84 Ga. 570, 573; Langston v. Anderson, 69 Ga. 65. See

priority "of any other incumbrance *originating* after the commencement of service or furnishing materials." The courts construe this to mean that a lien takes precedence of a mortgage executed and recorded after the service began, although equitably in existence before the said service, the lienor having no knowledge of the equity.<sup>1</sup> In North Carolina the lien of the sub-contractor, when duly filed, has precedence of all other liens attaching to the property subsequent to the time the work was commenced or the material furnished.<sup>2</sup> An order for a general debt of the contractor, accepted by the owner, is not entitled to priority of payment, where the balance due the contractor is insufficient to satisfy all the subsequent lien claimants.<sup>3</sup> But one who holds a builder's order on the owner for extra work has priority over the holder of a subsequently drawn order of the same kind.<sup>4</sup> A prior mortgage may be merged by a purchase, and the mechanics' lien left on top. A mechanics' lien was entered against property upon which rested the lien of an older mortgage. Subsequently the mortgage was assigned to a stranger, who thereafter became the purchaser of the property at a tax sale, and took tax titles. Held, that the purchase at a tax sale by the assignee of the mortgage extinguished the mortgage debt, and the mechanics' lien remained as the only lien upon this property in the hands of its purchaser. Amounts paid by the mortgagee for taxes and insurance on the property have not a priority over the mechanics' lien; for even if the mortgage debt had not been extinguished by the purchase, there was no provision in the mortgage securing such payments by its lien.<sup>5</sup> The lien of a chattel mortgage on machinery is subsequent to the lien of him who furnished it.<sup>6</sup> A lien for materials furnished a tenant with the landlord's knowledge is superior to the landlord's lien for rent, and also to a chattel mortgage on the improvements taken after they were made and before lien proceedings.<sup>7</sup> Under the Iowa law where materials are furnished for an independent building on mortgaged land, the material-man has a prior lien on the building, and the mortgagee is prior as to the land. The court may order

also, as to *bona fide* purchaser, Thornton v. Corver, 80 Ga. 397; Stonewall, &c. Asso. v. McGruder, 43 Ga. 9; Frazer v. Jackson, 46 Ga. 621; Natl. Ex. Bank v. Graniteville Manuf. Co., 79 Ga. 22, 26.]

<sup>1</sup> [Soule v. Hurlbut, 58 Conn. 511, 518 *et seq.*]

<sup>2</sup> [Lumber Co. v. Hotel Co., 109 N. C. 658.]

<sup>3</sup> [McPherson v. Walton, 42 N. J. Eq. 282.]

<sup>4</sup> [Dunn v. Stokern, 43 N. J. Eq. 401.]

<sup>5</sup> [Devereux v. Taft, 20 S. C. 555.]

<sup>6</sup> [Currier v. Cummings, 40 N. J. Eq. 145.]

<sup>7</sup> [Natl. Lumber Co. v. Bowman, 77 Iowa, 706.]

the sale of the building as personal property, without redemption by the owner, but giving the mortgagee a reasonable chance to redeem the building before its removal, and in the mean time awarding possession of the building to the purchaser, when such possession will not materially interfere with the owner's possession of the land not occupied by the building.<sup>1</sup> The Maryland law gives a lien for labor or materials priority over all other liens or incumbrances arising subsequent to the commencement of the building.<sup>2</sup> A lien for materials attaches at the time the first item is furnished under an entire contract, and takes precedence of a mortgage made after that time.<sup>3</sup> A lien relates back to the time the materials were furnished, and takes precedence of a mortgage executed after that time, but before claim of lien.<sup>4</sup> A sub-contractor's lien has priority over a mortgage executed before the sub-contractor began work, but after the erection of the building under the principal contract had begun.<sup>5</sup> The Indiana law of March 9, 1889, gives the claim of laborers and material-men a specific preference in respect to the fund derived from the property to which their lien would attach.<sup>6</sup> The lien of an encumbrance executed after the contract between the owner and mechanic or material-man is subsequent to the mechanics' lien.<sup>7</sup> A lien will attach only to the improvements where the land has been sold under a prior incumbrance.<sup>8</sup> In North Carolina an agricultural lien duly executed and registered takes precedence of a mortgage of prior date and registration, upon the "crops" therein subjected, to the extent of the advances made. . . . Section 1799 of the Code provides: "If any person shall make any advancement either in money or supplies, to any person who is engaged in, or about to engage in, the cultivation of the soil, the person so making such advances shall be entitled to a lien on the crops which may be made during the year upon the land in cultivation of which advances so made have been expended, in preference to all other liens existing or otherwise, to the extent of such advances," etc., provided an agreement therefor shall be executed in the mode prescribed.<sup>9</sup> But the lien of the landlord for rents, etc., takes precedence of all other

<sup>1</sup> [Luce & Co. v. Curtis, 77 Iowa, 347.]

<sup>2</sup> [Rosenthal v. Md. Brick Co., 61 Md. 591.]

<sup>3</sup> [Iowa Mortg. Co. v. Shanquest, 70 Iowa, 124.]

<sup>4</sup> [Germania B. & L. Asso. v. Wagner, 61 Cal. 349.]

<sup>5</sup> [Hydraulic Press Brick Co. v. Bor-

mans, 19 Mo. App. 664; Merrigan v. English, 9 Mont. 113.]

<sup>6</sup> [Goodbub v. Estate of Hornung, 127 Ind. 182.]

<sup>7</sup> [Page v. Bettes, 17 Mo. App. 366.]

<sup>8</sup> [Heidegger v. Atlantic Milling Co., 16 Mo. App. 327.]

<sup>9</sup> [Wooten v. Hill, 98 N. C. 48, 51.]

liens.<sup>1</sup> A laborer who works on a farm upon agreement for a share of the crop, has a lien on the crop superior to an agricultural lien for advances created subsequently to the laborer's contract.<sup>2</sup> A mechanics' lien is superior to a lien for attorneys' fees of the assignee of the property, who filed a bill to have the property sold and claims adjusted.<sup>3</sup> In Indiana expenses and wages of laborers employed by the assignee of a mine are made prior to all other claims, even a mortgage or mechanics' lien recorded before assignment, or a claim for labor performed before the assignment, or the claim of a purchaser without knowledge of the laborer's claim.<sup>4</sup> A laborer's lien on a railroad attaches to the whole road in the State, and is prior to either a subsequent or previous mortgage of the said entire road, with the single exception of a mortgage to secure *bona fide* holders of negotiable paper without notice actual or constructive of the liens.<sup>5</sup> A material-man will not have priority of a trust unless he shows that work began before the lien of the trust attached.<sup>6</sup> Where a statute declares that the lien "shall be preferred to all other incumbrances which may be attached to such buildings," etc., "subsequent to the commencement of such buildings," etc., this priority will be sustained when the facts warrant it against a judgment rendered on an attachment, and the facts recited in the judgment are not evidence against the lien claimant if the latter was not a party to such judgment.<sup>7</sup> A statute provided that the mechanics' lien should prevail "as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles," etc.; a contractor began to deliver rails on September 1, 1874, and continued until November 11 following; within the six months allowed to commence suit, the contractor filed his complaint to enforce his lien under said statute; on March 1, 1875, a mortgage of the property was executed: held, the contractor, although his suit was entered subsequent to the last date, had priority by virtue of the statute.<sup>8</sup>

§ 227. **Priority not affected by Sale during Erection.** — The sale of land during the progress of a building on which liens have attached cannot affect the rights of the mechanics.<sup>9</sup> It is the

<sup>1</sup> [Wooten v. Hill, 98 N. C. 48; Brewer v. Chappell, 101 N. C. 251; Branch v. Galloway, 105 N. C. 193; Thigpen v. Maget, 107 N. C. 39.]

<sup>2</sup> [Rouse v. Wooten, 104 N. C. 229, 231.]

<sup>3</sup> [Steger v. Arctic Refrig. Co., 89 Tenn. 453, 460.]

<sup>4</sup> [Shull v. Fontanet, & Co. Asso., 128 Ind. 331.]

<sup>5</sup> [Farmers' L. & T. Co. v. Canada, & Co., 127 Ind. 252, 262 *et seq.*]

<sup>6</sup> [Martin v. Campbell, 6 Mackey (D. C.), 297.]

<sup>7</sup> [Young v. Stoutz, 74 Ala. 574.]

<sup>8</sup> [Chicago & Alton R. R. Co. v. Union Rolling Co., 109 U. S. R. 702.]

<sup>9</sup> Jean v. Wilson, 38 Md. 288.

duty of those purchasing or taking liens on the property to ascertain whether it is encumbered by mechanics' liens.<sup>1</sup> A party purchasing premises on which buildings are in process of erection, having knowledge of the same, is bound to make inquiry as to the rights of parties furnishing materials or performing work thereon, and is charged with constructive, if not actual notice of their lien. A sale of property after the lien is fixed, to a party cognizant of the same, gives him no rights as against the lien.<sup>2</sup> Again, it has been held that a purchaser who buys while a house is building, where the law is that the mechanics' liens shall date from "the commencement of the building," and that "every such debt shall be a lien, as aforesaid, until the expiration of six months after the work shall have been finished . . . although no claim shall have been filed therefor," etc., will be postponed to the claims of the mechanics, although the title of those by whom the building is erected may not have been recorded, because the building itself operates as notice, by affording the means of knowledge. Without this opportunity of knowledge a mechanics' lien against the holder of an unrecorded equitable title will not avail against a *bona fide* purchaser of the legal title, it being a universal principle that, as between any two parties, he whose negligence has occasioned a loss, and who might have prevented it by the use of due effort, should be the sufferer, rather than he who has been guilty of no omission, and who has taken every precaution compatible with his situation.<sup>3</sup> Again, where an act creates a lien for materials, etc., from the time materials are found or the work done, if the claim be filed within six months, selling the property during its erection does not affect the lien, otherwise, it was said, the mechanics might be easily defrauded.<sup>4</sup> So, where "master-builders and mechanics of every denomination contracting . . . shall have a lien in the nature of a mortgage," etc., and "all the right, title, and interest the defendant had in the said lot . . . at the time the said contract was entered into . . . may be sold to satisfy the judgment," the lien of the builder is paramount to the right of one who took an assignment of the lease subsequent to the completion of the building and recording the contract.<sup>5</sup> Under a statute which simply gave "any person who shall perform labor . . . for erecting . . . a house, . . . by

<sup>1</sup> Clark v. Moore, 64 Ill. 273.

<sup>2</sup> Austin v. Wohler, 5 Bradw. (Ill.) 300.

<sup>3</sup> Gault v. Deming, 3 Phila. 337; Hahn's Appeal, 39 Penn. 409.

<sup>4</sup> Edwards v. Derrickson, 4 Dutch. (N. J.) 45; Vandyne v. Vanness, 1 Halst. Ch. (N. J.) 485; Dunklee v. Crane, 103 Mass. 470.

<sup>5</sup> Montandon v. Deas, 14 Ala. N. S. 33.



virtue of a contract with the owner thereof," a lien, and "such lien shall continue for sixty days after such labor performed . . . and may be secured by attachment," without specially stating when it should attach, and where an owner mortgaged it, while a builder was in process of erecting a house thereon under a contract previously made with the owner, and of which mortgage the builder had no actual notice, and the builder completed it without objection from the mortgagee, it was held that the mortgagee, at the time of taking the mortgage, was chargeable with notice of the contract, and the lien of the builder had priority over the mortgage for all that he did by virtue of the contract, both before and after the mortgage.<sup>1</sup> So, where a mortgage was made on the property of a railroad, and subsequently a certain site of land was agreed to be given the railroad on condition of its establishing a depot on the ground, and the railroad accepted the gift and erected a building for a depot, it was held that a mechanic who had assisted in plastering the depot had a lien prior to the mortgagee's, because the equitable title to the land did not become complete in the railroad until it loaded and unloaded cars, and stopped trains for passengers at the depot, and that, prior to that, the lien of the mechanic had already attached.<sup>2</sup> When the statute gives the mechanics' lien priority over all "liens and encumbrances" subsequent to the commencement of the building, these words include conveyances.<sup>3</sup>

§ 228. **Priority for Labor and Materials furnished subsequent to Mortgage, etc.**—So, where the language of the statute is that the mechanic has a lien "against all persons except encumbrancers by judgment rendered and by instrument recorded before the commencement of the work or the furnishing of the material," the lien attaches from the commencement of the work or the furnishing of the first material under a contract, and embraces all work done or materials furnished under such contract, either before or after the accruing of subsequent encumbrances on the property, provided the work or delivery was commenced before; and for this purpose the contract is an entirety, and whatever the mechanic may do under such con-

<sup>1</sup> *Cheshire Prov. Int. v. Stone*, 52 N. H. 365.

<sup>2</sup> *Botsford v. New Haven R. R.*, 41 Conn. 454.

<sup>3</sup> [*Warden v. Sabins*, 36 Kan. 165, 169, citing *Phillips*, § 227; *Fleming v. Bumgarner*, 29 Ind. 424.]

<sup>4</sup> Sections 228-230, were cited with approbation in *Mellor v. Valentine*, 3 Colo. 258. Section 228 was also cited with approbation in *Chadbourn v. Williams*, 71 N. C. 450; and also in *Keystone v. Gallagher*, 5 Colo. 27.

tract dates,\* as to his lien, from the day he commenced work, and not from the date of the performance of the several parts of his undertaking, and will cut out mortgagees who loan money prior to last delivery of materials.<sup>1</sup> Again, it has been held that, where a lien-holder has priority from the time he commences his work, the lien of a judgment rendered after labor is commenced is postponed to the lien of the material-man or laborer, although the labor is completed and the last of the materials delivered after the judgment is docketed.<sup>2</sup> In those States where the authority of a contractor under the lien law is co-extensive with the necessities of the building, and endures until it is finished, a contract for the erection of a house is in effect a power to charge the land for the purposes of the contract, and the commencement of the building is notice to all the world of the existence of the power. And where the property was sold during its erection, and, after a short interval, the contractor was permitted to go on and complete the building, to hold the land discharged under such circumstances would be highly unjust to those who furnished materials in reliance upon its protection. They have an equity which the purchaser of an unfinished house, who suffers it to be finished afterwards on the credit of the original authority, plainly wants. The duty of a purchaser to examine the records ceases, under ordinary circumstances, upon the execution of the conveyance; but the purchase of a house in the process of erection renders incessant vigilance indispensable until the whole is finished and the period passed within which the law permits a mechanics' lien to be binding. Until then the liens filed against the estate of the vendor are, in fact, filed against that of the purchaser, whether he be or be not named as owner.<sup>3</sup> For extra work on a building by the contractor, in pursuance of a general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgage given by the owner before the extra work was commenced, provided the work was done with the knowledge of the mortgagee and without objection from him.<sup>4</sup> In those cases where the purchaser has title by virtue of judicial sale, the building is released from all liens prior to the sale, they being transferred to the proceeds. But after the purchase, a silent acquiescence in the continuance of the work by the workmen upon the building raises an implied assumpsit on the part of the owner to pay for the work so done. If he did not intend to pay,

<sup>1</sup> *Monroe v. West*, 12 Iowa, 119.

<sup>2</sup> *Barber v. Reynolds*, 44 Cal. 519.

<sup>3</sup> *Mears v. Dickerson*, 2 Phila. 19.

<sup>4</sup> *Soule v. Dawes*, 14 Cal. 247.

it was his duty at once to have apprised him of the fact; having failed to do so for a considerable length of time, the work done between the date of the purchase and the time when the mechanic was notified should be paid for.<sup>1</sup> But for buildings erected by a vendee no lien would exist in favor of mechanics who had worked for the vendor; nor, on the other hand, would it be just to permit the expense of buildings erected by the vendee to operate to the exclusion of the previous liens of mechanics.<sup>2</sup>

§ 229. **To secure Priority for Subsequent Labor, etc., Contract must be Entire.** — To secure priority for all work done in the erection of a building from its inception, when the lien is given "from the commencement of the labor or furnishing of materials," the claim should arise under an entire and not under distinct contracts. Where work, distinct in its nature, is performed at different times, the law supposes it to have been performed under distinct engagements, as where the work at one time is for building and at another time for repairing. So where two distinct contracts are in fact made, as for different parts of the work, the work done under each contract must be considered as entire of itself. But when work or material is done or furnished, all going to the same general purpose, as the building of a house or any of its parts, though such work be done or ordered at different times, yet if the several parts form an entire whole, or are so connected together as to show that the parties had it in contemplation that the whole should form but one, and not distinct matters of settlement, the whole account must be treated as a unit, or as being but a single contract. Thus, where a statute provided that the person entitled to the lien shall make an account in writing, etc., and shall file the same, etc, "and said account shall, from the commencement of such labor or furnishing of such materials, and for two years after the completion of such labor, . . . operate as a lien on such building," etc.; and the builder or material-man has begun to furnish work or materials toward the erection or repair of a building, without any agreement as to the amount of material or duration of his employment, but under a reasonable expectation that further work or material will be required of him to finish the undertaking, and he is afterwards called upon, from time to time, to furnish the same until the building is completed, he is entitled to his lien as though acting under an original contract for the entire labor or materials so furnished. In such case no

<sup>1</sup> Watkins v. Wassall, 15 Ark. 73;      <sup>2</sup> Planters' Bank v. Dodson, 17 Miss. s. c. reaffirmed, 20 Ark. 410.      527.

part of his claim is postponed to a mortgage or judgment lien intervening during the erection of the building.<sup>1</sup> Again, where the lien of the mechanic has preference over "all liens subsequent to the commencement of the work," etc., and work is done and materials furnished continuously under one contract or employment made by the vendor of the house and lot, whilst owner thereof, the mechanic can recover for the whole, without giving notice to the purchaser that he holds him responsible. The sale of a house and lot, while the house is in process of erection and unfinished, cannot affect the rights of mechanics who were then engaged in working, and continued afterwards to work, under a previous employment by the vendor when owner.<sup>2</sup>

§ 230. **When Contract is Entire, so as to secure such Priority.**<sup>3</sup>—A contract to furnish "all the cut stone required" for a building, according to plans and specifications, for such price as the same should be reasonably worth, "payment to be made from time to time as the work under said contract progresses," is one contract; and where it is provided that "whoever performs labor or furnishes materials for erecting any building, by virtue of a contract or agreement with the owner thereof, shall have a lien," the statute gives the lien irrespective of the fact that the contract may be to furnish distinct items of material, or perform distinct items of labor, to be paid for as the work progresses. Where a contract of this nature is made and partly performed before the execution of a mortgage to a third person, and is in process of performance at the execution of a mortgage, and the law is that "the lien shall operate from the commencement of such labor or the furnishing of such materials," even as against the mortgage, notwithstanding some part of the materials are furnished and used in the building after the execution of the mortgage, the lien of the mechanic will have priority.<sup>4</sup> So, where mechanics work by the job, the mechanics' lien commences with the work and continues to enlarge, *pari passu*, with its progress; and no intervening purchaser, lien, or encumbrance can break its continuity or curtail its extent.<sup>5</sup> So, where there is but a single contract covering all the materials and work, the lien will protect the last articles as against a mortgage recorded between the delivery of the first and last; and that though a period of seven months intervene between them.<sup>6</sup> If the law

<sup>1</sup> Hazard Powder Co. v. Loomis, 2 Disney (Cin.), 544.

<sup>2</sup> Miller v. Barrall, 14 Md. 173.

<sup>3</sup> See § 233.

<sup>4</sup> Milner v. Norris, 13 Minn. 455.

<sup>5</sup> Caldwell Institute v. Young, 2 Duv. (Ky.) 582.

<sup>6</sup> Vito Viti v. Dixon, 12 Mo. 481.

require the notice to be filed "within a certain time after all shall be finished," where there is a continuous, open, current account, the cause of action will be deemed to have accrued as to all on the date of the last item. Where the work is done under different contracts, or such time intervenes between the different items as to raise the presumption that the work had once ceased, and the contract was completed, a different rule would obtain. But if the work is done almost daily, the lien continues and dates from the last item. Any other rule would render the lien of the mechanic next to, if not quite, a sham and delusion; and it is therefore as much the duty of subsequent encumbrancers to ascertain whether mechanics have liens, as to take notice of liens properly recorded.<sup>1</sup> But, where "the lien shall not avail or be of force against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed," in order to create a lien upon real estate by a parol contract against a subsequent mortgagee without notice, it is necessary that the contract should be precise, certain, and definite, not subject to be affected, modified, and changed by the will of one of the parties. Accordingly it was held that an agreement, made prior to a mortgage, to paint and paper a house at a fair price, mentioning the number of coats of paint for outside, but not for inside, nor number of rooms, nor what rooms were to be papered, nor quality of paper, does not constitute a contract sufficiently precise to create a lien against a mortgagee.<sup>2</sup> A contract to build all remaining railroad bridges in a certain county, the times of payment being fixed to commence from the completion of each bridge, is, for the purpose of filing a mechanic's lien, an entire contract.<sup>3</sup>

**§ 231. Effect of Completion or Abandonment of Contract on such Priority.** — If, however, the work has been completed on a building, or abandoned, and then begun anew, and the lien is given to be contemporaneous with the commencement of the building, or if there be an entirely distinct contract under which subsequent labor is performed or materials furnished, and the lien of each mechanic dates only from the commencement of his work or furnishing of materials, in either of these cases the mechanics will be postponed to purchasers and subsequent encumbrancers. As where "the lien for work and materials, as aforesaid, shall be preferred to every other lien or encumbrance which attached upon such building and ground, or either of them, subsequently

<sup>1</sup> Jones v. Swan, 21 Iowa, 181.

<sup>2</sup> [Smith Bridge Co. v. Bowman, 41

<sup>3</sup> Manchester v. Searle, 121 Mass. 418. Ohio St. 37.]

to the commencement of such building," and a second story was erected upon a row of one-story buildings, which had been roofed in, rented and occupied by tenants, the lien of a judgment has priority which attached after the first erection and before the addition of the second story. The justice and policy of this rule are apparent, because any other would deprive the owner of a new house or factory of the power of borrowing money to supply his own necessities or pay the workmen by whom it had been erected, and thus produce a result equally injurious to the parties and to the community.<sup>1</sup> So, when the plan of a building is changed and greatly enlarged while it is in the course of construction, the liens of mechanics and material-men subsequent to such change relate only to the commencement of the alteration on the ground, subject to all liens which had previously fastened on the land.<sup>2</sup> Where a party was working by the month in a mine, and the mine-owner mortgaged the property subsequent to the contract with the foreman for labor, it was held that all the work done subsequent to the mortgage, after the expiration of his then current month, must be postponed to the mortgage.<sup>3</sup>

§ 232. **When Purchaser or Mortgagee will have Priority.** — A *bonâ fide* mortgagee for value must be regarded as a "*bonâ fide* purchaser," within the letter and spirit of the mechanics' lien law,<sup>4</sup> and there is no question that when the sale or mortgage is prior to the commencement of any work or delivery of any materials, it will be preferred to its full extent in a contest with mechanics,<sup>5</sup> unless the purchaser or mortgagee has, by his own acts, compromised his rights. As where a mechanic erected a building on mortgaged property for the mortgagor, and obtained a mechanics' lien thereon under the statute. The mortgagor then gave another mortgage to a third party, whose interest, together with the equity of redemption, afterwards became vested, by purchase and foreclosure, in the first mortgagee; and it was held that the latter could not be called upon to redeem the mechanics' lien.<sup>6</sup> When a mortgagee has placed his mortgage upon record his rights are then protected by law. He has given such notice as the law has prescribed, and is not bound either to assent or dissent to any agreement made by the person

<sup>1</sup> Irvin v. Hovey, 3 Phila. 373.

<sup>2</sup> Smedley v. Conaway, 5 Am. Law Reg. (Penn.) 442.

<sup>3</sup> Capron v. Strout, 11 Nev. 304.

<sup>4</sup> Foushee v. Grigsby, 12 Bush (Ky.), 75.

<sup>5</sup> Jessup v. Stone, 13 Wis. 466; [Green v. Sprague, 120 Ill. 416.]

<sup>6</sup> Card v. Quinebaug Bank, 23 Conn. 355.

in possession for improvements.<sup>1</sup> The lien of the mechanic in such cases for work and labor done upon mortgaged property, at the instance of the mortgagor, is subordinate to that of the mortgagee, although the latter knew of such work and labor at the time the mechanic rendered the same, and did not object.<sup>2</sup> A mortgagee not in possession will not be affected unless his consent to the improvement is express.<sup>3</sup> But where supplies used for rebuilding bridges, building side tracks, and in making repairs, were furnished a railroad company from time to time under a continuous verbal contract made after default in the payment of the company's bonded interest and which was not terminated until the appointment of a receiver, — more than two years after the first supplies were furnished, — held that, notwithstanding the statute of frauds, the material men were under the circumstances entitled to a judgment for the balance due them, and to a lien superior to that of the mortgage creditors for the amount due, on the earnings of the road. . . . When under the conditions of a mortgage, the mortgagee, after default, permits the corporation to still operate the road, the operations thereafter must be considered for the benefit of the mortgagee and all others in interest, especially if betterments accrue therefrom.<sup>4</sup> The same rule of priority applies in favor of mortgages duly made and recorded prior to the statutory notice. They are preferred to the extent of their security, to the exclusion of the delinquent mechanic. Thus, where persons seeking to avail themselves of the lien "shall file in the recorder's office . . . notice of their intention to hold a lien," a mechanics' lien accruing on premises previously mortgaged, the mortgage must be first satisfied.<sup>5</sup> Under a similar statute in another State, it was declared that it seems the lien of a material-man cannot take preference over the lien of a prior mortgage.<sup>6</sup> The rule of *caveat emptor*, therefore, applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting buildings, furnishing materials, or putting labor on a lot of ground, it behoves him to examine and assure himself of the fact that the person with whom he contemplates making the contract, or for whose benefit he is about to employ his means or labor, has such an interest or title, unencumbered, as will enable him to avail himself of a valid or efficient lien. Under the system of regis-

<sup>1</sup> Hoover v. Wheeler, 23 Miss. 314.

<sup>2</sup> Pride v. Viles, 3 Sneed (Tenn.), 125.

<sup>3</sup> [Broman v. Young, 35 Hun, 173,

<sup>4</sup> [Blair v. St. Louis, &c. R. Co., 22 Fed. R. 769, 770.]

<sup>5</sup> Troth v. Hunt, 8 Blackf. (Ind.) 580.

<sup>6</sup> Walker v. Hauss Hijo, 1 Cal. 183.

tration in this country, a little diligence will always impart to a person the requisite information; and if he fails to inform himself, the law will not relieve him against the consequences of his own negligence.<sup>1</sup> In these cases the mechanic was put on inquiry by the fact that his employer had no title, and consequently he entered into the building contract subject to the equities existing between the parties, which equities he might have discovered by reasonable inquiry. Thus, in another case, where the owner contracted to sell a lot to a purchaser, with a mortgage to be made to a bank on the same, but no deed was placed on record, and while the ownership was thus, the purchaser employed a mechanic to make repairs to the house, the mechanic entered and began putting up a fence with the knowledge of the owner. The owner and purchaser then met to make a conveyance, and at the same time the mortgage was made to the bank, which had no knowledge of any claim of lien, it was held that the mortgage under the circumstances had priority.<sup>2</sup> Where the lien shall be preferred "to any lien or mortgage of which the lien-holder had no notice and which was unrecorded at the time the building was commenced," and, intermediate the execution and recording of a mortgage, work was commenced upon the mortgaged premises and a lien was filed, it was held that the lien of the mortgage was superior to the mechanics' lien, unless the mechanic, at the time he commenced the work, had no notice of the existence of the mortgage.<sup>3</sup> The fact that a prior deed of trust was upon an equitable estate will not postpone it to the mechanics' lien.<sup>4</sup> A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter by a contract between the company and a third party for the erection of buildings or other works of original construction, when, at the time of the mortgage, no statute existed giving such priority. The fact that at the moment of the execution of the mortgage the mortgagor had only an equitable title, does not allow the lien to attach itself to the legal estate.<sup>5</sup> In some cases, upon equitable reasons, the priority of a mortgage debt on railroads has been displaced in favor of even unsecured subsequent creditors, but those principles have application in keeping up, as a going concern, a railroad already built, and not for original

<sup>1</sup> *Bridwell v. Clark*, 39 Mo. 170.

<sup>2</sup> *Middletown Bank v. Fellowes*, 42 Conn. 36.

<sup>3</sup> *Root v. Bryant*, 57 Cal. 48.

<sup>4</sup> *Lunt v. Stephens*, 75 Ill. 508.

<sup>5</sup> [*Toledo, &c. Railroad Co. v. Hamilton*, 134 U. S. R. 296.]



constructions.<sup>1</sup> After a bill of foreclosure filed by a mortgagee, it is not within the power of the mortgagor pending his suit, by contract with a mechanic without the consent of the mortgagee, to create an incumbrance upon the property which can in anywise affect the rights of the mortgagee, as they may be declared by final decree.<sup>2</sup> A mortgage for part of the contract price executed to the contractor after the work, but in pursuance of the original contract, takes precedence of a material man's lien as to the part of the contract price thus secured.<sup>3</sup> In Maryland the statute gives a mechanic's lien priority to a mortgage recorded after the commencement of a building, but it does not mention deeds, and as a deed if recorded within the specified time takes effect from its execution. A deed executed before the building was begun but recorded afterward takes precedence of the lien.<sup>4</sup> Although the Iowa statute gives a lien priority over a previous mortgage, under some circumstances, yet the law does not apply where the mortgage has been foreclosed and the premises sold before the materials were furnished.<sup>5</sup> A floating chattel mortgage on two hundred thousand brick, and an agreement that eighty thousand of the brick should be used in a house on the land of Mrs. K., the mortgagee to have a mechanics' lien therefor will not affect other lien-holders on Mrs. K.'s property who had no notice. The word "floating" means that no specific brick were set apart. Brick were being manufactured all the time, and it was not shown whether the brick used were made before or after the mortgage.<sup>6</sup> The lien of a contractor or mechanic must give way to prior liens and incumbrances put on the property by a previous owner and duly recorded.<sup>7</sup> A lienor may take precedence of a mortgage executed before his lien attached if he can show that the mortgage was fraudulent as to creditors. But mere proof that the mortgage was without consideration is insufficient.<sup>8</sup> *Bona fide* purchasers before the filing of notice of lien take free of it. The legislature did not mean to hamper and cloud the title of real estate with claims of which no one has means of knowledge.<sup>9</sup> A party purchasing a building within four months from the time of its completion, or after repairs have been made upon it, takes it subject to any legiti-

<sup>1</sup> [Toledo, &c. R. R. Co. v. Hamilton, 134 U. S. R. 296.]

<sup>2</sup> [Hards v. Con. Mut. L. Ins. Co., 8 Biss. 234; Davis v. Ins. Co., 84 Ill. 508.]

<sup>3</sup> [Jones & M. Lumber Co. v. Murphy, 64 Iowa, 165.]

<sup>4</sup> [Beehler v. Ijams, 72 Md. 193.]

<sup>5</sup> [Shepardson Bros. v. Johnson, 60 Iowa, 239.]

<sup>6</sup> [Meredith v. Kunze, 78 Iowa, 111.]

<sup>7</sup> [National Bank v. Danforth, 80 Ga. 56, 68.]

<sup>8</sup> [Bewick v. Muir, 83 Cal. 368.]

<sup>9</sup> [Sisson v. Holcomb, 58 Mich. 634.]

mate claim against it for erecting or repairing the same. The law is notice to every one that such lien may be filed, and it behooves a party purchasing the premises to see that all such claims are satisfied or secured.<sup>1</sup> A purchaser takes free of lien unless it is shown that labor or materials went into the property he buys within ninety days before his purchase, although materials went into other buildings under the same contract after said purchase.<sup>2</sup> One buying property against which a lien has been filed upon the vendor but no jurisdiction of his person has as yet been obtained, takes subject to the lien.<sup>3</sup> Purchasers from insolvent companies must take notice that employees have a lien on its property for wages. Where an insolvent company entered into a written contract for the purchase of a quantity of scrap iron, and before delivery sold the contract to A. to whom it was delivered before employees' liens were recorded, it was held that the iron had become the property of the company and was subject to the wage lien.<sup>4</sup> One who takes a lien by assignment for a pre-existing debt is not a *bona fide* purchaser for value.<sup>5</sup> A purchaser at a sale under a trust deed executed by the owner after the lien suit was brought takes subject to the lien.<sup>6</sup> In New York a mortgage takes precedence when executed before the debt for labor was contracted.<sup>7</sup> The mortgagee's rights cannot be impaired by a contract which did not exist when the mortgage was made and to which he was not a party, nor by a prior contract of which he had no notice, and about which he was not put on inquiry. There was no evidence that the labor and materials, for which suits were brought to secure the statute lien, had been furnished, or that a contract to furnish them, of which the defendant had notice, had been made by the plaintiffs when the defendant took his mortgage.<sup>8</sup> A mortgage made after the furnishing of materials, but in pursuance of an agreement made before the furnishing, may take precedence of the material man's lien. As where the person B. to whom the materials are supplied has only a contract with the owner respecting the erection of buildings by B. and future conveyance of the land to him, and mortgages of it for a loan and for the price, one of the terms of the contract being that no liens shall be created by B.,

<sup>1</sup> [Doolittle & Gordon v. Plenz, 16 Neb. 153, 156, 157.]

<sup>2</sup> [Roose v. Billingsly, 74 Iowa, 51.]

<sup>3</sup> [Bennett v. Wilmington S. M. Co., 18 Bradw. 17.]

<sup>4</sup> [Aurora National Bank v. Black, 129 Ind. 595.]

<sup>6</sup> [English v. Lee, 63 Hun, 572.]

<sup>6</sup> [Buntyn v. Shippers' Compress Co., 63 Miss. 94.]

<sup>7</sup> [Raht v. Attrill, 106 N. Y. 423, 432.]

<sup>8</sup> [Cheshire Prov. Inst. v. Stone, 52 N. H. 365; Jacobs v. Knapp, 50 N. H. 71; Sargent v. Usher, 55 N. H. 287; Sly v. Pattee, 58 N. H. 102, 103.]

the mortgages made in pursuance of this agreement take precedence of the lien for materials though made after the materials were furnished. The material man was bound to know the restrictions of B.'s authority.<sup>1</sup> On June 18, 1886, a building which the plaintiff had erected under a contract made with the defendant Curtis was accepted by the latter. On that day, at about two o'clock in the afternoon, the defendant Curtis and his wife executed a mortgage upon the premises for the sum of \$900 to a savings bank, and received from the bank that amount. The savings bank sent the mortgage by mail to the county clerk at Poughkeepsie, who received it at seven o'clock P. M. on June nineteenth. On June twenty-first at eight P. M. the plaintiff filed a mechanic's lien upon the same premises. Held that the lien of the mortgage was entitled to priority over that of the plaintiff. It only affects such interest as the owner has at the time of filing notice. The fact that the bank knew that the plaintiff had not been paid did not affect its right to such priority, in the absence of proof that it colluded with Curtis to defeat the claim and lien of the plaintiff.<sup>2</sup> Where the owner mortgages and insures the property after the building is begun, and assigns the policy to the mortgagee, the builder's liens cannot hold the insurance money against the mortgagee.<sup>3</sup> A mechanic has priority as to the *building* against a pre-existing mortgage, and if the building burns and there is insurance for which the owner paid the premiums, equity will follow the fund and treat it as if it were the building; but if the mortgagee insures in his own name or the owner's payable to the mortgagee, and pays the premiums, he will be entitled to hold the insurance money against the mechanic.<sup>4</sup> A lien for the keep of a horse is subject to that of a valid prior mortgage of him.<sup>5</sup> One who had accepted a new for an old mortgage, in ignorance of intervening mechanics' liens, was held not entitled to reinstatement of the original mortgage.<sup>6</sup> A decree enforcing a lien is not competent to prove the existence of the lien prior to the date of the decree, as against one holding a mortgage prior to that date, who was not a party to the action.<sup>7</sup> Where A. has the prior lien on property under a deed of trust and B. has a mechanic's lien on the same property, B. is entitled to enforce his lien by a sale of the

<sup>1</sup> [Lumber Co. v. Schweiter, 45 Kan. 207, 211.]

<sup>2</sup> [Munger v. Curtis, 42 Hun, 465.]

<sup>3</sup> [Galyon v. Ketchen, 85 Tenn. 55.]

<sup>4</sup> [Elgin Lumber Co. v. Langman, 23 Ill. App. 250.]

<sup>5</sup> [Reynolds v. Case, 60 Mich. 76.]

<sup>6</sup> [McKeen v. Haseltine, 46 Minn. 426.]

<sup>7</sup> [Corser v. Kindred, 40 Minn. 467.]

property, subject to the paramount lien of A.<sup>1</sup> Where there is a prior mortgage the court may in its discretion order a separate sale of the building. The mortgage is a first lien on the whole property and is to be first satisfied out of the proceeds.<sup>2</sup> Where there is a prior lien on the land the court may order a sale and removal of the building, but where building and land belong to the same owner and there is no prior lien on the land it is error to order a sale of the building alone.<sup>3</sup> Where there is a mortgage subsequent to some of the liens under the statute, but prior to others, the proper method of distributing the proceeds of the sale of the premises is to first set aside as applicable to the payment of statutory liens a sum equal to the amounts of the liens prior to the mortgage, next out of the remainder pay the mortgage, and then apply what is left, if anything, together with what was first set aside for that purpose, ratably among all the lien-claimants, without any priority among themselves.<sup>4</sup> Where a judgment enforcing a mechanic's lien does not attempt to charge anything except the interest of the owner, it is not subject to the objection that it is given precedence over a prior mortgage.<sup>5</sup>

§ 233. **Priorities when Mechanics fail to comply with Statutory Requirements.** — As the statute of each State fixes the time for the inception of the lien, it follows that whenever a notice of lien is made necessary for its creation, all transactions with *bona fide* purchasers, prior to strict compliance with the statutory requisites of notice, will be effectual, even to the entire exclusion of the mechanic.<sup>6</sup> As, where a statute provides that "such lien shall not attach thereto until the person claiming the lien shall have filed a written memorandum," it cannot take precedence of a prior mortgage, and the mortgage attaches to all that had been attached to the land and thus had become realty.<sup>7</sup> One entitled to a lien which takes effect upon notice, until he files his notice has no greater equities than other general creditors, and is affected by all equities existing at that time in favor of those dealing with his debtor; his lien attaches only to the estate and interest of the debtor as it then exists. His lien is therefore subject to a prior equitable lien, although he had no notice of it.<sup>8</sup> Thus, where any person doing labor, etc., is declared entitled to a lien, "upon filing the notice, etc., for the

<sup>1</sup> [Buntyn v. Shippers' Compress Co., 63 Miss. 94.]

<sup>2</sup> [Miller v. Seal, 71 Iowa, 392.]

<sup>3</sup> [Early v. Burt, 68 Iowa, 716, 718.]

<sup>4</sup> [Finlayson v. Crooks, 47 Minn. 74.]

<sup>5</sup> [Globe, &c. Co. v. Doud, 47 Mo. App. 439.]

<sup>6</sup> Homans v. Coombe, 3 Cranch, C. C. 365.

<sup>7</sup> Hinckley v. James, 51 Vt. 240.

<sup>8</sup> Payne v. Wilson, 74 N. Y. 348.

value of such labor, etc., upon such house, etc., to the extent of the right, title, and interest at that time existing, of such owner," etc., a lien cannot be asserted where the person alleged to be the owner of the premises did not own the premises at the time the notice of lien was filed, he having previously conveyed them to another. An innocent purchaser, without notice and for a valuable consideration, is not bound to take notice of a mechanics' lien filed against a former owner, who conveyed the premises to such purchaser's grantor (whether fraudulently or not), previous to the filing of such lien. He is not bound to notice any lien filed after his grantor's title was conveyed.<sup>1</sup> Where a mortgagee purchased the mortgaged premises at a trustee's sale, and took the property wholly discharged from the lien of the mechanic, a purchaser, whoever he may be, from such mortgagee must take a title equally exempt from the lien.<sup>2</sup> Again, if the property on which the lien is claimed has been purchased on valid judgment and execution, before the date of lien, the purchasers' claim has preference, and must be satisfied before the statutory lien can attach.<sup>3</sup> Again, under the statute last above quoted, where there had been a *bona fide* conveyance of the property to trustees for the benefit of creditors, prior to the filing of the notice of lien, there was no lien, although the deed was not recorded until two hours afterwards, unless the registry acts required the deed to be recorded to pass title. For the acquisition of the statutory lien the statute itself must be strictly pursued; and there is in this no inequity, as the party claims a right not existing at common law, and the benefit of a summary proceeding for the enforcement of that right. If he allow the time to pass prescribed for filing the notice, until the owner has sold the property, he cannot complain; he has still his action for the debt. He only fails by his own delay to secure the benefits of the statute. If it were equitable that the material-man should have a lien upon the building into which his materials had entered, from the time he parted with them, the legislature was as well aware of this fact, and, not having so provided, he must take the lien which has been given him.<sup>4</sup> So, where without fraud the owner of a house and lot conveyed them to trustees for the benefit of creditors, and laborers, material-men, etc, having filed a notice of lien after the conveyance, averred,

<sup>1</sup> *Noyes v. Burton*, 29 Barb. (N. Y.) 631; s. c. 17 How. Pr. (N. Y.) 449.

<sup>2</sup> *M'Kim v. Mason*, 3 Md. Ch. Dec. 186.

<sup>3</sup> *McCullough v. Caldwell*, 5 Ark. 237; *Rose v. Gray*, 40 Ga. 156.

<sup>4</sup> *Quimby v. Sloan*, 2 E. D. Smith (N. Y.), 594; s. c. 2 Abb. Pr. (N. Y.) 93.

in a complaint filed to foreclose the alleged lien, "that the assignment was made subject to the claimant's rights under the act," it was held that there was no distinct or sufficient averment that a lien was specifically reserved to the claimants by the instrument itself, and that by setting up the execution of the assignment before the notice was filed, the plaintiffs had shown themselves devoid of any lien which could be foreclosed by a proceeding under the statute.<sup>1</sup> But in another case, under a law where "no property shall be liable for repairs, which shall have been conveyed, before any claim shall have been filed, to a purchaser," etc., an assignee for the benefit of creditors is not a "purchaser" within the act.<sup>2</sup> When the law requires a notice to be filed, and which is essentially defective in a matter of description, the mechanic will lose the benefit of the statute as against third parties, without other notice.<sup>3</sup> Or if the mechanic does not follow the directions of the statute in other important particulars, he does not acquire any interest or lien in the premises by reason of judgment against a mortgagor after foreclosure and sale.<sup>4</sup> There is no moral obligation on a purchaser to liquidate a claim, even with actual notice of its existence, which, on its face, was no lien at the time of his purchase.<sup>5</sup> A purchaser, therefore, at sheriff's sale is not bound to notice a deed or mortgage defectively registered, or a judgment or lien which appears on its face to be a nullity. Even had actual notice of it been given him, he would have been informed of nothing but an abortive attempt to create a lien.<sup>6</sup> Under a provision "that the liens created in pursuance of this act shall have precedence over all other liens or encumbrances which have attached upon the premises, subsequent to the time at which said notice was given," it was held that the lien begins only from the time of filing the notice, and a purchaser at any time before the giving of such notice takes title unaffected thereby. The fact that the mechanic is openly doing his work is not notice to any one, for it is not made so by the statute.<sup>7</sup> But where "the failure to file the claim in the time named shall not operate to defeat the claim as against any one except encumbrancers without notice, whose right accrued after the ninety days and before the claim is filed," encumbrancers whose claims arise before the ninety days expire are postponed to the mechanics. The reason is that the act of

<sup>1</sup> Jackson v. Sloan, 2 E. D. Smith, 616.

<sup>2</sup> Crump v. Gill, 9 Phila. 117.

<sup>3</sup> Montrose v. Connor, 8 Cal. 344.

<sup>4</sup> Eaton v. Bender, 1 Neb. 426.

<sup>5</sup> Bolton v. Johns, 5 Penn. 145.

<sup>6</sup> Goepf v. Gartiser, 35 Penn. 130.

<sup>7</sup> Cotton v. Holden, 1 MacArthur (D. C.), 463; Tucker v. Ormes, Id. 652.

building is notice to all the world. The above act protects only those whose rights accrued after the time fixed for filing claim, and before it is actually filed.<sup>1</sup> A mortgage taken more than ninety days after the last item of service, for value and without notice to the mortgagee of intent to claim a lien, is an encumbrance in good faith that has priority under the Iowa law, and a single small item in the account seven months after the end of the former reasonably continuous items, and several months after the mortgage, will not keep the account alive to defeat the mortgage priority.<sup>2</sup> Where the law gives a lien only from the time of filing notice, if the owner dies before such filing, the claim is on a level with his other debts, and cannot achieve priority by a subsequent filing. By his death all debts became a lien.<sup>3</sup> The law of Kentucky gives a mechanic a lien on the building and interest of the employer in the land, good against the employer for one year, though unrecorded and prior to all liens and mortgages subsequent to the commencement of the building, etc., provided the said mechanics' lien is duly recorded, but not otherwise.<sup>4</sup> Under the provision "no creditor shall be allowed to enforce the lien created under the foregoing provisions as against, or to the prejudice of any other creditor or encumbrancer or purchaser, unless the suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due or payable," the *cestui* is the "other encumbrancer," in case of suit to enforce a lien on trust property, and to postpone his lien to that of the mechanic or material-man he must be made a party to the proceedings within the said six months.<sup>5</sup> In Georgia if the lien on realty is not recorded the plaintiff's claim will not take precedence of judgments junior to the performance of the work, but senior to the judgment in the laborer's suit.<sup>6</sup> In Louisiana a builder who does not record his contract is postponed to a mortgage subsequently given a third party.<sup>7</sup>

§ 234. **Priorities when Mortgagees, etc., fail to comply with Statutory Requirements.** — On the other hand, when the mortgage is not recorded until the lien of the mechanic has attached, the former will be subordinated to the latter. Thus, a mortgage given prior to the commencement of a building, but not recorded

<sup>1</sup> Evans v. Tripp, 35 Iowa, 372.

<sup>2</sup> [Gilbert v. Tharp, 72 Iowa, 714.]

<sup>3</sup> [Hoff's Appeal, 102 Pa. St. 218 ;  
Watt v. Vezin, 15 Phila. 212.]

<sup>4</sup> [Louisville Bldg. Asso. v. Korb, 79  
Ky. 190, 194.]

<sup>5</sup> [Lamb v. Campbell, 19 Bradw. 272.]

<sup>6</sup> [Love v. Cox, 68 Ga. 269.]

<sup>7</sup> [Van Loan v. Heffner, 30 La. An.  
1213.]

for six months, as provided by a registry act, and the building having been commenced two days prior to the recording of the deed, a mechanics' lien is preferred, though his claim originated after the six months. The mortgagee having been guilty of negligence, it would be inequitable to prefer him to the builder.<sup>1</sup> A deed of trust made and delivered before, but not recorded until after, a lien attaches, will be postponed to the latter.<sup>2</sup> But where there was no law compelling a mortgage to be recorded, an unrecorded one had priority over a mechanics' lien which attached subsequently to its execution.<sup>3</sup> So, where the lien law establishes the lien to "the extent of the right, title, and interest of the owner at the date of filing the notice of lien," and a party furnished materials to an owner, who agreed to pay therefor, half in cash and half by a first mortgage on one of the buildings. May 1, 1872, a mortgage was given to him for said sum, together with six per cent interest thereon, but not acknowledged. On June 29 he procured the mortgage to be acknowledged, and on August 9 it was recorded. On September 21, fearing there might be some claim of usury, he obtained another mortgage from the owner, omitting the six per cent. On foreclosure it appeared that, without any knowledge of the mortgagee one W. had, on June 19, filed a lien. It was held that the lien of the mortgage had priority over that of W.<sup>4</sup> A sale upon a judgment, though subsequent to a mortgage, upon a mechanics' lien of record prior to the mortgage, will discharge the lien of the mortgage.<sup>5</sup> So where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one to whom the other mortgagor had meanwhile sold, the new mortgage being for a less sum by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud to induce a court of equity to interfere, and give the mortgage priority over intervening liens.<sup>6</sup> In another case, it was said, although a mortgage, which is a subsisting encumbrance upon premises on which a mechanics' lien is claimed when the premises were purchased by the present owner, is a prior encumbrance to the liens of the mechanics and materialmen; yet, when buildings on which liens are claimed were commenced, and the bulk of the materials are furnished before a

<sup>1</sup> *Mitchell v. Evans*, 2 Browne (Penn.), 329; *Stuyvesant v. Browning*, 33 N. Y. 203.

<sup>2</sup> *Thielman v. Carr*, 75 Ill. 386.

<sup>3</sup> *Prow v. Munie*, 4 Cal. 173; *Quimby v. Sloan*, 2 Abb. Pr. (N. Y.) 93.

<sup>4</sup> *Payne v. Wilson*, 18 N. Y. Supreme Ct. 302.

<sup>5</sup> *Goepf v. Gartizer*, 3 Phila. 335.

<sup>6</sup> *Dingman v. Randall*, 13 Cal. 512.



second mortgage is recorded, it is clear that the liens, if valid, have priority over such second mortgage.<sup>1</sup> Again, a mortgage recorded, but held by the mortgagor ready for delivery when he should obtain a loan, was held not to have been recorded, so as to be notice as against lien claimants, until the day when the loan was made and the mortgage delivered. The advancing of money by the mortgagee upon a mortgage recorded before its delivery will not be held to relate back to the date of execution, acknowledgment, or registry of the mortgage where the rights of lien claimants have intervened, in the absence of any antecedent agreement for the loan, and where the making of the loan was not in any wise dependent on the fact of the registry of the mortgage.<sup>2</sup>

§ 235. **Fraud of Owner does not affect Priority of Mechanic.** — It is no objection to the validity of mechanics' liens that the mortgagor procured them to be filed, or that he concealed them from the mortgagee at the time of obtaining the loan for which the mortgage was given. If the mortgagor was actuated by fraudulent motives, it cannot affect the rights of *bona fide* lienholders.<sup>3</sup> So a purchaser of a building from the owner, pending a proceeding to enforce a mechanics' lien created for its erection, will take the title subject to the lien which may be established in that proceeding. And if such purchaser sell the house to another, and induce him to remove it to another lot, he will hold the proceeds of the sale as a trust fund liable to discharge the lien.<sup>4</sup> It will be presumed that the price was fixed with reference to the encumbrance, or that he secured himself from loss by appropriate covenants.<sup>5</sup> Or where the person who contracted the debt which created the lien sold to another, who reserved from the purchase-money an amount sufficient to pay the debt, the latter cannot complain of a decree making the debt a lien on his interest in the land.<sup>6</sup>

§ 236. **Priority of Future Advances under Mortgage.** — Claimants of liens are bound to know what has been done under a duly registered mortgage.<sup>7</sup> Mortgages, and deeds in the nature of mortgages, to secure future loans or advances, if *bona fide*, have always been sanctioned, and, if otherwise unexceptionable, their validity cannot be questioned. The mere fact that materials are to be supplied, instead of money, will not impair their validity,

<sup>1</sup> Morris Co. Bank v. Rockaway M. Co., 1 McCart. Ch. (N. J.) 189.

<sup>2</sup> Mutual Ben. L. Ins. Co. v. Rowand, 26 N. J. Eq. 389.

<sup>3</sup> Gordon v. Torrey, 2 McCart. Ch. (N. J.) 112.

<sup>4</sup> Ellett v. Tyler, 41 Ill. 449.

<sup>5</sup> Blauvelt v. Woodworth, 31 N. Y. 285.

<sup>6</sup> Kidder v. Aholtz, 36 Ill. 478.

<sup>7</sup> Holmes v. Ferguson, 1 Oreg. 220.

and, if given before the commencement of a building, will be good against mechanics' liens.<sup>1</sup> So where there is a mortgage, in common form, to secure payment of a bond for a sum certain, which bond is in fact given in consideration of a promise by the obligee to advance a similar sum, for the purpose of building on the mortgaged land, and in certain proportions to the progress of the buildings, it has priority over mechanics' liens recorded subsequently to the mortgage, although before the advances were all made.<sup>2</sup> Again, where "such lien shall be preferred to all other liens which may attach subsequent to the commencement of such building," and a mortgage was executed and recorded Aug. 21, and a contract to build and work commenced on Aug. 23, the lien of the mortgagee was prior; and this, although the mortgage did not expressly provide for future advances.<sup>3</sup> A building-fund company agreed to advance to one of its members money to build a house on a lot owned by him, and advanced a part of the money, and took a lien upon the lot and the buildings which might be erected upon it to secure the advances made and to be made. The member then made a contract for the building of a house on the lot with a mechanic, who, to raise money faster than it could be obtained from the company, assigned the contract to a person who undertook to advance the money; and the contract was recorded so as to create the mechanics' lien. After the contract was recorded, the company advanced money from time to time, as it had agreed to do, which was paid to the assignee in part satisfaction of his advances to the mechanic, with a knowledge on his part that it came from the company, and that the company claimed priority of lien upon the property. The company was entitled to priority over the mechanics' lien for its advances made after the contract was recorded, as well as for its advances made before; otherwise, it would operate as a virtual fraud on the company, as they paid their money, and it was accepted by the assignee with full knowledge that the company expected to be indemnified in preference to all other claimants.<sup>4</sup> In another case it was held that money advanced as a building was erected, on a judgment and mortgage executed to secure the same before building was commenced, had priority over the mechanics' lien.<sup>5</sup> A. agreed to advance money, in ten instalments, as buildings

<sup>1</sup> *Brooks v. Lester*, 36 Md. 65; *Robinson v. Williams*, 22 N. Y. 380.

<sup>2</sup> *Moroney's Appeal*, 24 Penn. 372.

<sup>3</sup> *Martsoff v. Barnwell*, 15 Kan. 612.

<sup>4</sup> *Iaeger v. Bossieux*, 15 Gratt. 83.

<sup>5</sup> *Robinson v. Consol. Real Estate*, 55 Md. 105.

progressed, and took a mortgage on the property to secure the whole amount. After making eight payments, he assigned the agreement. B., the assignee of A., was the contractor for building the houses, and he assigned the agreement to C., to raise the means for completing the same. By an arrangement between them at the time of such assignment, B. made drafts upon C., in favor of persons who furnished materials and labor, which were accepted by him, when in funds, under the agreement. The contractor, in order to complete the houses and entitle himself to the residue of the instalments, procured advances from D. on the strength of A.'s agreement. D. advanced the amount of the two remaining instalments; and it was held that D. was entitled to stand in the place of A., as regarded the two instalments; and that in a reference to determine the priority of liens as between A. and D. and a subsequent mortgagee and judgment creditor, D. had a prior lien in equity to the two latter for the amount of the two instalments.<sup>1</sup> And where the owner of a lot contracted for the erection of a house thereon, and agreed to pay certain sums of money as the work progressed, and on its completion to convey a certain other lot, for which purpose R. released a mortgage on the lot, and during the work the owner of the lot on which the building was being erected mortgaged it to R., and subsequently on its completion, by agreement with the builders, gave his note for a certain sum of money, instead of the lot he was to convey, and assigned note and lien to plaintiff, it was held that as much of the claim as represented the value of the lot which was to have been conveyed had to be postponed to the mortgage.<sup>2</sup> A mortgage given to indemnify the mortgagee against loss in consequence of his drawing notes in favor of the mortgagor is as valid where the notes are to be drawn *in futuro*, as where they are already drawn; and if the parties, by indorsement on the mortgage, agreed that, instead of drawing notes for the whole amount, the mortgagee shall indorse part, for which the mortgage shall be a security, the mortgagee will have a lien for the indorsements, not only against the mortgagor, but also against the material-men who subsequently erect buildings on the ground.<sup>3</sup> A mortgage recorded before the building is commenced takes precedence of the mechanics' lien, though the advances secured by the mortgage are not made till after the work has begun, being made to pay for labor and materials.<sup>4</sup>

<sup>1</sup> Griffin v. Burnett, 4 Edw. Ch. 673.

<sup>2</sup> Soule v. Dawes, 7 Cal. 576.

<sup>3</sup> Lyle v. Ducomb, 5 Binn. 585.

<sup>4</sup> [Wisconsin Planing Mill Co. v. Schuda, 72 Wis. 277.]

§ 237. **Prior Mortgage secures Priority upon Subsequent Improvements.** — An important inquiry arises here, Does a prior mortgage on land which is subsequently improved by buildings extend its lien over the latter to the exclusion of mechanics who erected them? In answer it has been said that the lien created by the statute does not and cannot interfere with the prior encumbrance created by mortgage upon the land on which the building is erected. It is equally clear, upon the principles of the common law, and independent of any statutory provision, that any building or improvement erected upon land subsequent to the execution of the mortgage becomes a part of the land, and subject to the existing encumbrance. And it may be safely affirmed that a mortgagee cannot be deprived of the benefit derived from subsequent improvement, except by clear and express legislative provision. In case of doubt, his acknowledged common-law right would prevail.<sup>1</sup> In another case, it was said that, where the law does not provide otherwise, prior liens by mortgage or judgment are not affected in their priority on the improvements in favor of mechanics.<sup>2</sup> So, where there is a mortgage on the land, the court cannot, unless specially authorized, attach a lien on the buildings to the exclusion of the prior lien.<sup>3</sup> Again, under a law which gives to machinists a preference over "all liens subsequent to the commencement of the work," his lien upon a steam-engine built at his shop, and then carried to and put up in a factory upon which there was a previous mortgage, is not entitled to priority over such mortgage, as the mortgage operates from the very moment when anything is affixed to the land, and the machinist's claim cannot have a priority over the mortgage of an older date, where the statute only provides for a priority over liens "subsequent," and not to those coeval or simultaneous.<sup>4</sup> So, where a mortgage on land previous to the commencement of a building has priority over that given to mechanics for their work and labor, a sale under such a mortgage by the sheriff divests the land of any encumbrance, and leaves the party to his claim on the purchase-money; and the claim filed by a mechanic cannot be the foundation proceeding against the house to which it attached, in the hands of the purchaser.<sup>5</sup> So, the mortgagee of a lot of ground has a lien not only on the ground, but on the buildings erected subsequent to the

<sup>1</sup> Newark Lime & Cement Co. v. Morris, 2 Beas. Ch. (N. J.) 133.

<sup>2</sup> Choteau v. Thompson, 2 Ohio St. 114.

<sup>3</sup> Bridwell v. Clark, 39 Mo. 170.

<sup>4</sup> Denmead v. Bank of Baltimore, 9 Md. 184; M'Kim v. Mason, 3 Md. Ch. D. 186; Jones v. Hancock, 1 Md. Ch. D. 187.

<sup>5</sup> Leib v. Bean, 1 Ashm. (Penn.) 207.

mortgage, in preference to brick-makers and other material-men who claim under a lien law which makes the property subject to the payment of their debts: "before any other lien which originated subsequent to the commencement of the building." In the opinion it was said that erections made on lands which have been mortgaged operate as a further security to the mortgagee, for *cujus est solum, ejus est usque ad cælum*. It cannot be asserted with any shadow of reason that a mortgagee shall be placed at the mercy of a mortgagor; that the latter may prostrate what erections are on the ground, and build up others at his sole will and pleasure, which might diminish the security of the former upon a sheriff's sale, if they are not to be paid out of the proceeds of the sheriff's sale. The mortgagor might thus cover the whole of the vacant city lot with expensive buildings, and, if the mortgagee is eventually compelled to buy it in for his own security, he would be subjected to pay moneys out of his own pocket according to the ideal value of those buildings in the estimation of others.<sup>1</sup> A depot building was held, as against a mechanics' lien, to be property connected with the lien of the railroad, and regarded as part of the mortgaged premises, which were described by a general description, covering the railroad and land, ground, depots, station-houses, etc., acquired and to be acquired.<sup>2</sup> The lien for repairs upon a completed railway is not superior to the lien of a mortgage executed after the completion of the road, the repairs constituting an integral part of the road.<sup>3</sup>

§ 238. **Lien may have Priority on Improvements by Statute, notwithstanding Prior Mortgage.** — It cannot be affirmed, however, that the mortgagee has vested rights in any building or improvement not erected at the date of the mortgage, or that a lien which gives to the party whose labor is employed or materials expended in the erection of such building a priority of payment out of the building, trenches upon any vested right of the mortgagee, or infringes any constitutional provision.<sup>4</sup> It is competent to the legislature to give the mechanic, on the building he erects, a lien having priority over a previously recorded mortgage on the land.<sup>5</sup> The wisdom or policy of such an enactment is a matter exclusively for legislative consideration. Accordingly, under a statute which declares that when "the building and lot are sold by virtue of the lien, the deed shall convey to

<sup>1</sup> Lyle v. Ducomb, 5 Binn. 585.

<sup>2</sup> Coe v. N. J. Midland R. Co., 31 N. J. Eq. 105.

<sup>3</sup> Bear v. B. C. R. & M. R. Co., 48 Iowa, 620.

\* Newark Lime & Cement Co. v. Morison, 2 Beas. Ch. (N. J.) 133.

<sup>5</sup> Brooks v. Railway Co., 101 U. S. 443; French v. Burlington R. R., 4 Dillon, C. C. 570.

the purchaser the building free from any former encumbrance on the lands, and shall convey the estate in the said lands, subject to all prior encumbrances," the lien of the mechanic has priority on the building, but is subject to prior encumbrances on the land.<sup>1</sup> So, when the law gives the mechanic a prior lien on the building "to any other lien whatsoever," an older mortgage, or other ordinary creditors' lien on the land, even with notice to the mechanic, cannot preclude the latter's priority,<sup>2</sup> but is subordinate to a prior encumbrance so far as respects the land.<sup>3</sup> A statute which provides that mechanics "shall have a lien, to secure their payment upon the building and materials aforesaid, and said building and materials shall not be subject to any other lien whatsoever, until the aforesaid lien shall have been cancelled," creates a lien on the building paramount to any lien on the land exclusively existing before the contract was made.<sup>4</sup> Again, where the law gave a lien "on the building, erections, or improvements" in preference to all others, it was held that, although a railroad was built in sections, at different times and under separate contracts, yet it was one entire "improvement," and the lien of the mechanic extended to the entire line, although the work was done on one section only, and this as against prior mortgagees of the land.<sup>5</sup> So where a law provides that "no encumbrance upon land created before or after the making of a contract under the provisions of the lien law shall operate upon the building erected or materials furnished, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied; and, upon questions arising between previous encumbrancers, and creditors under the provisions of this chapter, the previous encumbrance shall be preferred to the extent of the value of the land at the time of making the contract, and the court shall ascertain, by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest," — this statute declares, in express terms, that a deed of trust which had been previously executed, and which was an encumbrance upon the premises, could not operate upon the materials furnished by the lienor. And consequently, if the previous encumbrance could not operate upon these materials, then a sale under the deed of trust could convey no title to them to the purchaser; or, if any

<sup>1</sup> Newark Lime & Cement Co. v. Morrison, 2 Beas. Ch. (N. J.) 133.

<sup>2</sup> McLaughlin v. Green, 48 Miss. 175; Ivey v. White, 50 Miss. 146.

<sup>3</sup> McAllister v. Clopton, 51 Miss. 257.

<sup>4</sup> Otley v. Haviland, 36 Miss. 19; Hawley v. Henderson, 34 Miss. 261.

<sup>5</sup> Brooks v. Railway Co., 101 U. S. 443; Meyer v. Hornby, Id. 728.

title was conveyed, it was subject to the prior lien of the mechanics to have their debt first paid out of the proceeds derived from the sale of them.<sup>1</sup> By the phraseology, "the previous encumbrance shall be preferred to the extent of the value of the land at the time of making the contract," must be understood the land with such improvements as there were upon it at the time of the execution of the mortgage. If, for example, the owner of unencumbered realty, with a building upon it, execute a mortgage thereon, and afterwards has repairs made upon the building, for which a mechanics' lien is enforced, such lien would take priority over the mortgage only to the extent of the additional value given to the property by the improvements. Thus, if to a house and lot worth fifteen thousand dollars, and subject to a mortgage, additions or improvements be made by the mortgagor in such mode as to make the premises worth eighteen thousand dollars, the mechanics and material-men engaged in making these improvements would have a prior lien to the extent of three-eighths of the proceeds of sale, and the increased market value added to the property would measure the extent of the priority of their lien, without reference to the costs of the materials or labor actually furnished. To hold, in a case of that kind, that their priority of lien attached to the entire building, which may have constituted the bulk of the value of the property when the mortgage was given, and the value of which may have been but slightly increased by the improvements, would be to destroy the lien of a prior mortgagee, in a mode that cannot be conceded to have been within the intent or power of the legislature.<sup>2</sup> So, where a mechanics' lien law gives a lien on a building, and prior to the making of the contract for materials for an improvement to an old structure a mortgage existed on the land and building, and the new structure could not be removed without materially injuring the old one, it was held that the lien of the mechanic was subordinate to that of the mortgage.<sup>3</sup> Again, where the lien "shall attach to the buildings, erections, or improvements, for which they were furnished or done, in preference to any prior lien or encumbrance or mortgage, upon the land upon which the same is erected or put," it does not take priority over an existing mortgage on improved property, and this rule prevails even though the building be

<sup>1</sup> *Gaty v. Casey*, 15 Ill. 189. A provision similar to this seems to have been adopted in several States which have recently revised their laws.

<sup>2</sup> *Croskey v. North Western Man. Co.*, 48 Ill. 481.

<sup>3</sup> *O'Brien v. Pettis*, 42 Iowa, 294.

changed so that very little of the original structure remains: otherwise, the value of a mortgage upon improved property would be greatly diminished. Not so with a partially erected building, when the materials are furnished for its completion.<sup>1</sup> Under the Illinois statute a prior encumbrance has the preference as to the land, and the lien-holder as to the improvements.<sup>2</sup> So in Missouri where there is a mortgage on the land before the building is begun, the mortgage has priority over the mechanics' lien as to the land, but is secondary as to the building, and a lien will be declared on the building alone.<sup>3</sup> Where improvements and repairs are made upon buildings already on the land when a prior mortgage was executed, the lien for such repairs and improvements is subject to such prior mortgage, but if the building, erection, or improvement is an independent affair not in existence when the mortgage was taken, it will be subject to the "mechanics' lien," in preference to such prior mortgage, and may be sold and removed.<sup>4</sup> The holder of an equity of redemption in real property cannot improve the mortgage lienor out of his security. Prior mortgage lienors are entitled to priority over mechanics' liens as to the ground, but their lien must be postponed to the latter as to the buildings to which it attaches.<sup>5</sup> A lien attaches for machinery furnished for the completion of a mill at the date at which it was furnished; and a prior mortgage upon the mill and lot takes precedence of the lien only as to the lot, but is subject to the lien as to the mill, which lien is not affected by the foreclosure of the mortgage.<sup>6</sup> In so far as machinery furnished for a building of which it becomes a part enters into the completion of an unfinished building, the lien therefor, so far as the building is concerned, takes precedence over a prior mortgage.<sup>7</sup> In Oregon, however, one constructing a building for the owner in fee of mortgaged premises cannot have a separate sale of the building, although the land alone may be sufficient for the mortgage. The building becomes at once a part of the realty, and as much subject to the mortgage as any other part.<sup>8</sup>

§ 238 *a*. **Division of Proceeds of Sale, when Mechanic has First Lien on Building.** — In Illinois, where there is a mortgage on land

<sup>1</sup> *Equitable Life v. Slye*, 45 Iowa, 618.

<sup>2</sup> [*Condict v. Flower*, 106 Ill. 107, 119; 220.]

<sup>3</sup> [*Langford v. Mackay*, 12 Bradw. 223.]

<sup>4</sup> [*Fischer v. Anslyn*, 30 Mo. App. 316.]

<sup>5</sup> [*Dugan v. Scott*, 37 Mo. App. 663, 671.]

<sup>5</sup> [*McAdow v. Sturtevant*, 41 Mo. App. 220.]

<sup>6</sup> [*Hall v. St. Louis Manufacturing Co.*, 22 Mo. App. 33.]

<sup>7</sup> [*Hall v. Mullanphy Planing Mill Co.*, 16 Mo. App. 454.]

<sup>8</sup> [*Inverarity v. Stowell*, 10 Oreg. 261, 264, citing Phil. § 176.]



prior to and existing at the time of the commencement of a building, the mechanic is secured by express statute priority on the building. The vested rights, however, of the mortgagee in the land are undisturbed. In the event of a sale of the entire property, the proceeds are consequently paid to each party in proportion to the value of the land and building respectively. It is therefore necessary in such cases that the court should find the value of the land and of the improvements separately.<sup>1</sup> Again, it was said, that where a statute preserves the lien of a prior encumbrancer on land, and gives a first lien to the mechanic on the building, the court in ordering a sale should find the value of the lot before the improvement, and also of the building, and determine what proportion of the proceeds each shall have. It is error not to do this, but to require the lien of the mechanic to be first paid.<sup>2</sup> So, where a prior mortgagee has his lien on the land, and the mechanic on the building, on a sale of the whole under a proceeding to enforce a mechanics' lien, the proceeds of the sale represent and stand in the place of the land and the building, and the parties have the same proportionate share in the proceeds that they had in the property before it was sold. The land will be estimated at its value before the improvements were put on it.<sup>3</sup>

§ 239. **Effect of Priority.** — The priority here referred to is a right to be paid according to the order of time in which the respective liens have attached upon the property, to the exclusion of those which are subsequent. Accordingly, if in a suit to enforce a mechanics' lien the property be ordered to be sold, and some of the defendants hold encumbrances on the property which are older than the complainant's lien, those encumbrancers, in the order of the dates of their liens, should be preferred to the mechanic.<sup>4</sup> So, where a mortgage, judgment, or other lien takes effect after the commencement of one or more mechanics' liens, but before the commencement of others, the latter must be postponed until payment of the mortgage lien.<sup>5</sup> The effect, therefore, of extinguishing a prior lien is to let in the next oldest encumbrance.<sup>6</sup> A first lien has no power to impart to a third any of its precedence so as to give the latter priority over a second lien. If the first is released, the second becomes first in priority.<sup>7</sup> If there are several deeds of trust on

<sup>1</sup> *Miller v. Ticknor*, 7 Bradw. (Ill.) 393.

<sup>2</sup> *Grundeis v. Hartwell*, 90 Ill. 324.

<sup>3</sup> *Bradley v. Simpson*, 93 Ill. 93.

<sup>4</sup> *Close v. Hunt*, 8 Blackf. (Ind.) 254.

<sup>5</sup> *Hazard Powder Co. v. Loomis*, 2 Disney (Cin.), 544.

<sup>6</sup> *Biscoe v. Tucker*, 14 Ark. 515.

<sup>7</sup> *Phoenix Mut. Ins. Co. v. Batchen*, 6 Bradw. (Ill.) 621.

the same property, and one of them be declared void at the suit of a creditor, such creditor is not entitled to be substituted in the place of such void encumbrance, but the subsequent valid encumbrances have preference.<sup>1</sup> But in another case it was held that where the lien has preference, "subject only to all mortgages created and recorded, or registered prior to the commencement of the building," and A. agreed with B., at the execution of a mortgage by the former to the latter, that part of the amount for which it was given should be applied to the payment of two mortgages, then liens upon the premises embraced in that mortgage, and that the balance of it should be expended on a building on premises covered by B.'s mortgage. A. had purchased the land subject to the two mortgages. Afterwards, but before the registry of the mortgage, a building was commenced. It was held that B. was subrogated to the rights of the two mortgages to the extent of the money paid by him on account of them, and that notwithstanding the payment was made after building was commenced.<sup>2</sup> But if a deed of trust be made for the benefit of stockholders and material-men, neither will have priority over the other. The order in which claims are mentioned in a deed of trust does not, *per se*, give any preference or priority of right.<sup>3</sup>

§ 240. **Priority not disturbed by Acts of Third Parties.** — When the rights of conflicting encumbrancers have become fixed, it is beyond the power of others, by any arrangement between themselves, to impair the priorities of the former. This proposition is illustrated by a case where a lien was *pro tanto* extinguished by reason of set-off; a builder and lumber-merchant, it was held, could not agree afterwards to apply the subject of set-off to another building, subsequently erected by the same person, against which the lumber-merchant had neglected to file a claim in due time, to the prejudice of a third person, who had purchased the first house before the commencement of the second.<sup>4</sup> So a mechanic cannot establish his claim for work done on a house, as against an innocent purchaser from his employer, under the statute, where, at the time when the work was done, his employer had counter demands against him more than sufficient to counterbalance the fair price for his work.<sup>5</sup> Again, a party who has furnished materials, etc., cannot contract with his debtor so as to extend his lien upon premises to the prejudice of

<sup>1</sup> Lewis v. Caperton, 8 Gratt. 148.

<sup>2</sup> Barnett v. Griffith, 27 N. J. Eq. 201.

<sup>3</sup> Cross v. Cohen, 3 Gill (Md.), 257.

<sup>4</sup> Hopkins v. Conrad, 2 Rawle (Penn.),

316.

<sup>5</sup> Graham v. Holt, 4 B. Mon. (Ky.) 61.

a mortgagee. If he give time to his debtor beyond the period allowed by the statute, the lien will be lost, as between the party who furnished the materials and others who have anterior liens.<sup>1</sup> So, where a statute provided that the suit must be brought within twelve months from the time the money was to be paid, in order to secure the lien, and if it be not brought within that period, it cannot prevail, the parties cannot, subsequent to their original contract, and after its completion, change the time of payment fixed by that contract, when the twelve months have expired, and yet enforce the lien under the statute, as against other encumbrancers.<sup>2</sup> It is therefore not competent for a debtor to create upon any portion of his property a lien, which shall have precedence of all other encumbrances, by admissions that are inconsistent with actual facts. Nor can he, by making such admissions, restore a lost lien, as by the owner of property admitting, contrary to the facts, that the material-man has furnished articles, within the time by which a lien is protected by statute, so as to exclude other encumbrancers.<sup>3</sup> But in one case, where a mortgage covering a railway and all apparatus was executed, and three hundred of the bonds issued before the road was wholly graded, and when no more than one-fourth of the cost of construction had been expended; and while in that state the company, being unable to finish the construction, contracted with some third party to do it, under a contract to pay him partly in their bonds and partly in money, and with an agreement that he should retain the possession and use of the road and its fixtures, etc., until paid, — it was decided, in equity, that the contractor acquired a lien prior to that of the mortgage to the extent of his expenditures.<sup>4</sup>

§ 241. **Priority may be contested.** — The priorities thus protected are those only of *bona fide* purchasers, mortgagees, and mechanics' lien claimants. A subsequent *bona fide* purchaser has always such interest in the premises as will enable him to attack a fraudulent lien claim,<sup>5</sup> and a *bona fide* mortgagee, under the construction of the mechanics' lien laws, is to be regarded as such purchaser.<sup>6</sup> Thus, one claiming title to property under a sheriff's deed executed on the foreclosure of a mortgage may, in an action brought by him to quiet his title against one who claims under a sheriff's deed executed on the foreclosure of a

<sup>1</sup> Brown v. Moore, 26 Ill. 421.

<sup>2</sup> Jones v. Alexander, 18 Miss. 627.

<sup>3</sup> Frost v. Ilsey, 54 Me. 345.

<sup>4</sup> Dunham v. Cin., Peoria, & Ch. R. R.,  
13 Railway T. 339.

<sup>5</sup> Walker v. Hauss Hijo, 1 Cal. 183.

<sup>6</sup> Gere v. Cushing, 5 Bush (Ky.), 304.

mechanics' lien, in which he was not a party, go behind the decree foreclosing the mechanics' lien, and show that no lien in fact existed.<sup>1</sup> He may also object to the form of such a lien claim filed against the estate of his debtor.<sup>2</sup> But the fact that a judgment on a mechanics' lien includes a charge of interest at two per cent, given for an extension, which interest is over and above the original contract price for the articles for which it is claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged against a subsequent encumbrancer.<sup>3</sup> Where a mortgage had priority over a lien, and a sale is made under foreclosure of the mortgage, it was held that the lien claimants were cut off, although they were not made parties to the foreclosure.<sup>4</sup> The mechanic, on the other hand, may by virtue of his lien contest the validity of a prior sale or mortgage.<sup>5</sup> The purchaser at the foreclosure sale under a mechanics' lien, which attached subsequently to the record of a mortgage of the same estate, may set up as a defence in a suit for the foreclosure of the mortgage, usury in the transaction on which the mortgage is founded.<sup>6</sup> A fraudulent conveyance, made with intent to defeat the recovery of such claims, would be undoubtedly set aside in an action prosecuted for that object.<sup>7</sup> So a conveyance of premises made in fraud of mechanics will have no effect to bar or preclude the foreclosure of their liens, although the notice of lien is filed subsequent to such conveyance, but within the statutory limit.<sup>8</sup> And where, by agreement between the mechanic and defendant, a judgment was rendered in a suit to enforce the mechanics' lien, and the land and building ordered to be sold, and this was in fraud of the rights of a third person, who had acquired title to the land and building, divested of the lien, it was held that such third person could come into equity to vacate the judgment and enjoin a sale of the land and building under it.<sup>9</sup> But in one case, it was said, inasmuch as a mortgagee in possession has the legal title against the whole world, subject to the rights of the mortgagor, and where he mortgaged the property and subsequently erected a building on it, for the cost of which a mechanics' lien was filed, the holder of the lien cannot object to the legality of the mortgage,

<sup>1</sup> *Horn v. Jones*, 28 Cal. 194.

<sup>2</sup> *Knabb's Appeal*, 10 Penn. 186.

<sup>3</sup> *Gamble v. Voll*, 15 Cal. 507.

<sup>4</sup> *Raymond v. Post*, 25 N. J. Eq. 447.

<sup>5</sup> *Stone v. Anderson*, 26 N. H. 506 ;

*Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618.

<sup>6</sup> *Knickerbocker v. Hill*, 16 Abb. Pr. (N. Y.) N. S. 321.

<sup>7</sup> *Quimby v. Sloan*, 2 E. D. Smith (N. Y.), 594 ; s. c. 2 Abb. Pr. 93.

<sup>8</sup> *Meelan v. Williams*, 36 How. Pr. (N. Y.) 73.

<sup>9</sup> *Christian v. O'Neal*, 46 Miss. 669.

in the face of which he contracted. It is not the province of the mechanic in such a case to determine the legality of the recorded title, for, having contracted with notice of the encumbrance, he is postponed until it is paid.<sup>1</sup> As soon as knowledge of the fraud or other infirmity comes to the contesting party, immediate steps should be taken to determine the question judicially, before the rights of innocent third parties intervene. Thus, it has been decided, where a lien creditor feels himself aggrieved by any of the circumstances connected with a sale under a mortgage by the sheriff, he should, previous to the acknowledgment of the deed by the sheriff, apply to the court from which the process on the mortgage issued, to set the sale aside; or, if he could establish that by any arrangement between the parties the mortgage was satisfied, and that the money paid by the sheriff was applicable to the payment of the lien creditors, he should cause the money to be brought into court, and, on the distribution of the fund, test the legality of his claim and that of the other lien creditors to the proceeds.<sup>2</sup> When a mechanic avers priority to a mortgage, and the mortgagor denies it, but gives no evidence of the facts, the burden of proving is on the mortgagor. It is his duty to disclose the facts of his title in answer to the mechanics' complaint, and to prove those facts, and if he fails to do so the court will hold the lien to be the prior claim.<sup>3</sup>

§ 242. **Priority upon subsequently acquired Property.** — A contest may sometimes arise between the priority of right on a mortgage, which purports to convey property not owned by the mortgagor at the date of its execution, and mechanics who, when it is subsequently acquired, claim liens by virtue of work and labor expended thereon. Although the maxim is true, that a person cannot grant what he has not got, yet a railroad company authorized to borrow money and issue their bonds, to enable themselves to finish and stock the road, may mortgage as security not only the then acquired property, but such as may be acquired in future. The grant in such case takes effect upon the property when it is brought into existence, and belongs to the grantor in fulfilment of an express agreement, founded on a good and valid consideration, when no rule of law is infringed or rights of a third party prejudiced. Hence, where second mortgagees and holders of bonds of a second issue brought suit upon those bonds, recovered judgment, issued execution, and levied it upon a part of the rolling-stock, which was not in existence when the first

<sup>1</sup> *Ferguson v. Miller*, 6 Cal. 402.

<sup>3</sup> [*Harmon v. Ashmead*, 68 Cal. 321.]

<sup>2</sup> *Leib v. Bean*, 1 Ashm. (Penn.) 207.

mortgage was given, but which was expressly mentioned therein as subject to it, the judgment creditors were postponed to the claims of the first mortgagee.<sup>1</sup> In another case, where a mortgage in terms purported to cover not merely the works completed or in progress at the time, but also lines of ditches and flumes for conducting or distributing water which might be thereafter constructed by the company as appurtenant to or connected with the works, this broad language did not give a lien upon ditches for the construction of which no steps had been taken, by a survey and location of their lines, and which rested merely in contemplation. Some specific right of way, capable of identification from a previous survey or location, would seem to be necessary to constitute such property as is capable of mortgage or transfer, so as to pass subsequently constructed works thereon; and where it does not appear from the record whether, at the date of the mortgage, any survey or location had been made on the line of extension, without it, the property was not covered by the mortgage, and is still subject to the execution on a mechanics' lien.<sup>2</sup> The Supreme Court of Wisconsin has expressed the opinion that the doctrine, where a railroad is mortgaged with its franchises, that such mortgage would attach to all subsequent property acquired by the company, tends to great hardship and injustice towards the smaller creditors of these corporations.<sup>3</sup> A mortgage of after acquired property operates only by way of equitable estoppel, and is effective only as against the mortgagor and his privies in contract. It can attach to such property only in the condition in which it comes into the mortgagor's possession, and if the lien of a mechanic has then attached to it, such lien is entitled to priority over the mortgage.<sup>4</sup>

### *Vendor's Lien : —*

§ 243. **Priority of Vendor's Lien.**<sup>5</sup> — The vendor's lien will be preserved intact against all mechanics having notice that the purchase-money, or any part thereof, remains unpaid.<sup>6</sup> The principle upon which courts have proceeded in establishing this lien is, that a person who has the estate of another ought not, in

<sup>1</sup> Pennock v. Coe, 23 How. (U. S.) 117.

<sup>2</sup> Ellison v. Jackson Water Co., 12 Cal. 542.

<sup>3</sup> Hill v. La Crosse R. R., 11 Wis. 227.

<sup>4</sup> [Hall v. Mullanphy Planing Mill Co., 16 Mo. App. 454.]

<sup>5</sup> This section was cited with approba-

tion in Macintosh v. Thurston, 25 N. J. Eq. 246.

<sup>6</sup> Neil v. Kinney, 11 Ohio St. 58; Logan v. Taylor, 20 Iowa, 297; Cochran v. Wimberly, 44 Miss. 503; Zeigler's Appeal, 69 Penn. 471; Hickox v. Greenwood, 94 Ill. 266; [Ruggles v. Blank, 15 Bradw. 436.]

conscience, as between them, to be allowed to keep it, and not to pay the full consideration money; and that a third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment: for it attaches to him also as a matter of conscience and duty. It would otherwise happen that the vendee might put another person into a predicament better than his own, with full knowledge of all the facts.<sup>1</sup> *Prima facie*, purchase-money is a lien on the land sold, and it lies on the vendee, and all others with full knowledge, to establish that in the particular case it has been intentionally displaced or waived by the parties.<sup>2</sup> If, under all the circumstances, it remains in doubt, then the lien attaches.<sup>3</sup> But inasmuch as this lien is a secret trust with the vendee in possession with muniments of title, and nothing to warn the public of its encumbrance, and particularly as the vendor need not have parted with the possession and made deed of his property until paid the full consideration, or had secured the unpaid residue by duly recorded mortgage which would have been notice to all the world, and having failed therein by his own acts and omissions, mechanics who make improvements, without notice of the vendor's rights, will not be postponed to his lien. When, however, the mechanic has notice of its existence, the prior right of the vendor is not affected, although the consideration is expressed to be paid, and even if a receipt therefor be indorsed on the back of the deed; and though the vendor stood by and saw repairs made without objecting, as he had no right to interfere. He, having sold the property, had a right to suppose that the contract would be performed on the part of the vendee.<sup>4</sup> Further, a purchaser, and so a mechanic, with notice of an outstanding lien for a balance of purchase-money unpaid, is liable to be affected by a payment of the sureties for such purchase-money to the vendor, who may thereby become substituted to his lien, and competent to enforce it for their indemnity.<sup>5</sup> And under a statute which provided, "when any contract shall hereafter be made in writing between the proprietor of land on the one part, and any person on the other part, for erecting," etc., where a mechanic, in pursuance of a written contract made with a person having a covenant for the conveyance of land, furnished materials and erected a building on the land, and

<sup>1</sup> Story's Eq. Jur. § 1219.

<sup>4</sup> Callaway v. Freeman, 29 Ga. 408.

<sup>2</sup> Magruder v. Peter, 11 G. & J. (Md.) 217.

<sup>5</sup> Magruder v. Peter, 11 G. & J. (Md.) 217.

<sup>3</sup> Story's Eq. Jur. § 1224.

afterwards such covenantee received a deed of the land, but at the same time mortgaged it to a third person who advanced the purchase-money, it was held that, as the covenantee had but an instantaneous seisin, no lien attached upon the land and building in favor of the mechanic for the labor and materials found by him.<sup>1</sup> In West Virginia the vendor's lien is superior to a mechanics' lien. Even where A. agrees to sell land to B., who goes into possession under an agreement that he will build on the land, after which A. is to convey it to him, A.'s lien for the price is superior to the liens of workmen and material-men. A.'s interest can only be subjected to a lien when he or his agent contracted with the mechanic.<sup>2</sup> Where a vendee of real estate who paid one fourth of the purchase price down, verbally agreeing to pay the remainder in ninety days, but failing to do so, had before the expiration of the ninety days erected a dwelling-house on the land, and mechanics and material-men sought to foreclose liens on the same, it was held, that the property should be sold as upon execution, and the proceeds applied to the payment (1) of the amount due on the contract of purchase; (2) of the liens; the remainder, if any, to the purchaser, but the lien-holders to be paid *pro rata*, if there was not sufficient after paying the purchase-price to satisfy the liens.<sup>3</sup>

§ 244. **Notice.** — The important inquiry in determining priority between the vendor and mechanic is, Had the mechanic either actual or constructive notice? A reservation of the legal title in the contract of sale, until the full payment of the whole of the purchase-money, is conclusive manifestation of the vendor's intent not to part with his lien therefor.<sup>4</sup> As, where a lot of ground was sold by parol, the vendor retaining the title-deeds, and the vendee took possession and commenced building a house, the vendor's lien was superior to that of other lien creditors who built the house, — it being the business of mechanics, before they agree to build, to examine the title to the land.<sup>5</sup> So, where the liens of mechanics were to be "preferred to every other lien or encumbrance which shall have attached upon the said property subsequent to the time at which the work was commenced or the materials furnished," a vendee was in possession of real estate under a verbal agreement for purchase, and while in possession employed a mechanic to erect a building on it. Before the com-

<sup>1</sup> Thaxter v. Williams, 14 Pick. (Mass.) 49.

<sup>2</sup> [Charleston L. & M. Co. v. Brockmyer, 18 W. Va. 586, 592.]

<sup>3</sup> [Irish v. Lundin, 28 Neb. 84, 90.]

<sup>4</sup> Magruder v. Peter, 11 G. & J. (Md.) 217.

<sup>5</sup> Kline v. Lewis, 1 Ashm. (Penn.) 31.



pletion of the building the vendor executed a deed, and at the same time the vendee executed a mortgage for the purchase-money, — the deed and mortgage was one act, and the vendor's lien secured by the mortgage was prior to the mechanics' lien.<sup>1</sup> Again, a vendee of a lot, holding only a bond for title when the purchase-money shall be paid, cannot, if he put improvements upon it, dispose of them, unless subject to the rights of the vendor. A mechanic cannot therefore sell or dispose of a house built by him on a lot to which his employer had only a bond for title, except subject to the rights of the vendor of the lot, for he occupies no better position than the vendee,<sup>2</sup> as the rights of a vendor for the purchase-money are paramount to the lien created by a vendee with only a bond for a deed.<sup>3</sup> So, if a vendee sell ground to a purchaser and take his notes for the purchase-money, giving him a bond to make title when the money is paid, and the vendee goes into possession and makes improvements; and the mechanic files a lien on his claim against the vendee; the property is not subject to the lien of the mechanic except in subordination to the vendor, notwithstanding the vendor had knowledge of the work, while it was being done, and made no objection.<sup>4</sup> So, where a person in possession of land under a bond for title erected a hotel upon the premises, and a mechanics' lien was filed by the person furnishing the lumber, and subsequently the person in possession procured a deed from the owner, and at the same time gave back a mortgage for the purchase-money, the mortgage debt had priority to that of the mechanic.<sup>5</sup> Where the law gives a lien by virtue of a contract "with the owner of the land," and extends the lien to any other interest which such owner may have in the land at the time of the contract, the interest of an owner who has given a contract for a deed to a purchaser who procures a building to be erected thereon is not affected by the lien of the mechanic, and he cannot be required to part with his title until he receives full payment of his purchase-money. The vendor is not a prior encumbrancer, in such case, under a law preferring mechanics to encumbrancers.<sup>6</sup>

§ 245. **Unpaid Purchase-Money secured by Mortgage, etc.** — Nothing is better settled than if the vendor, at the time of parting with his title, take a mortgage or judgment as a part of the transaction to secure his purchase-money, he retains a lien upon the estate conveyed, not to be displaced by any other encum-

<sup>1</sup> *Guy v. Carriere*, 5 Cal. 511.

<sup>2</sup> *English v. Foote*, 16 Miss. 444; *Orr v. Batterton*, 14 B. Mon. (Ky.) 100.

<sup>3</sup> *Millard v. West*, 50 Iowa, 616.

<sup>4</sup> *Callaway v. Freeman*, 29 Ga. 408.

<sup>5</sup> *Virgin v. Brubaker*, 4 Nev. 31.

<sup>6</sup> *Hickox v. Greenwood*, 94 Ill. 266; [*Ruggles v. Blank*, 15 Bradw. 436.]

brance, provided the mortgage be recorded within the time allowed, or the judgment be entered on the same day. There being no fractions of a day, the judgment lien is contemporaneous with the delivery of the deed. Although, it is true, it has been decided, in one case, under special circumstances,<sup>1</sup> that the lien of the mechanic took preference of the vendor's judgment, but that was because the vendor let go his grasp upon the purchase-money, by omitting to file his judgment for seventeen days after parting with his title. After such a long interval, it was impossible to say that the delivery of the deed and the entry of the judgment were one transaction; and a mechanics' lien upon the equitable estate attached to the subsequently acquired legal estate, because of the merger of the equitable estate, which took place by operation of law.<sup>2</sup> But the conveyance of the legal estate to the vendee, and the simultaneous execution of a mortgage to the party who advances the purchase-money, is not such a merger as will let in the mechanics' claim against the equitable estate of the vendee. Such a union, whether it be called merger or extinguishment, never takes place against the intention of the parties, where that intention is manifested, and where equity requires the distinction should exist. Where mechanics' liens are entered against an equitable estate, their value depends upon that estate, and they survive or perish with it. When that estate is founded upon a contract of purchase, every partial payment increases the security of the liens. Even if the money be borrowed for the purpose, the lender gains no priority over the prior liens on the equitable estate, unless he advanced his money upon a contract with the holder of the legal estate, and on the security of that estate. Therefore a mortgage for purchase-money is entitled to priority over a mechanics' lien against the equitable estate of the vendee, under the contract of sale, although dated more than sixty days prior to the time of delivery and recording, and by agreement made to a third person, who advanced the purchase-money.<sup>3</sup> So, where a vendee of land under articles commenced to build a saw-mill, and afterwards received a deed for the land, giving a judgment for the unpaid purchase-money, which was entered on the same day, the lien for the purchase-money judgment had priority over a mechanics' lien filed for the materials furnished for the mill, although the law gave the mechanics' lien priority to all liens "subsequent to the commencement of the building," because the

<sup>1</sup> *Lyon v. McGuffey*, 4 Penn. 126.

<sup>2</sup> *Stoner v. Neff*, 50 Penn. 258.

<sup>3</sup> *Campbell & Pharo's Appeal*, 36 Penn. 247.

judgment lien for the purchase-money was but a continuance of the prior right of the vendor.<sup>1</sup> A vendor's lien secured by a duly recorded chattel mortgage takes precedence of a mechanics' lien for repairs made at the purchaser's request.<sup>2</sup>

§ 246. **Priorities when Conveyance and Mortgage Contemporaneous.**—In another State, where "all and every dwelling-house . . . together with the right, title, and interest of the person owning such dwelling-house or other building, in and to the land upon which the same shall be situated, shall be subject to the payment of the debts contracted for, or by reason of any work done, . . . before any other lien which originated subsequent to the commencement of such house or other building," the lien is subordinate to that of the vendor of the land on which the building is erected, for unpaid purchase-money. Purchasers under judgments in favor of the lien acquire the right, title, and interest of the person owning the building, whether the same was held for life, in fee-simple, or for years. They acquire his rights, and nothing more or less. They have no divided or several interest, unless he had; but take the property, buildings, and lands as one entire thing, and by one entire and indivisible title, whenever it was so held by him. The settled doctrine is, that when property is conveyed by a man without his having paid for it, and with an understanding when he received it that he was at once to secure the payment by a mortgage or lien on the property itself, no right vests in him, except that which is subject to such payment. To the extent of the unpaid price he is never, in contemplation of law, the owner until it is paid. The delivery of the deed to the vendee, and his execution and delivery of the mortgage or other security for the unpaid purchase-money, are but parts of the same transaction, done in pursuance of the same agreement, and have such operation only as will best promote the lawful intention of the parties. Their operation is contemporaneous and connected, and affords no opportunity for the liens of judgments, or other creditors of the grantee, to attach to the legal estate before that of the grantor for the unpaid price. The doctrine is wholesome and just. No claim can be more equitable than that of the unpaid vendor to reimbursement out of the proceeds of the estate with which he has parted upon that express condition. Certainly the creditors of the vendee ought not to complain, for without the agreement there would have been nothing upon which their rights could

<sup>1</sup> *Stoner v. Neff*, 50 Penn. 258; *Zeigler's Appeal*, 69 Penn. 471.

<sup>2</sup> [*Denison v. Shuler*, 47 Mich. 598.]

ever possibly have attached; and, claiming a benefit from their debtor's purchase by means of his contract with the vendor, they have no right to be placed in a better situation than the debtor himself. Their interest is based upon his, and cannot in equity and justice go beyond it.<sup>1</sup> Where one, who has purchased lands upon an agreement that part of the purchase-money shall be secured by mortgage to be given on the delivering of the deed, commences, without the written consent of the vendor, to erect buildings upon the land before the actual delivering of the deed and mortgage; the mortgage, if afterwards given pursuant to the agreement and duly registered, has preference over any lien claim, although the materials or labor were furnished before the execution of the mortgage, because the seisin of the purchaser was a merely transitory one, to which no lien could attach, as the deed and mortgage were delivered simultaneously. The right of priority will pass to a purchaser at a sheriff's sale under foreclosure for the purchase-money.<sup>2</sup> Again, in another case, it was held that the delivery of the purchase-money mortgage, when made coincident with the conveyance, prevents the legal estate from vesting in the purchaser, even for an instant. Hence it continues unaffected by the mechanics' lien.<sup>3</sup> If N. deeds land to B., and takes a mortgage back as part of the same transaction, a laborer employed by B. prior to said conveyance, and without N.'s authority, has no lien as against the mortgage in N.'s hands.<sup>4</sup> Where a purchaser of land, P., bought materials of B., and afterward the deed to P. and a mortgage back for the purchase price of the land were executed, neither of them being recorded till after the materials were furnished, it was held that the mortgage was intrinsically superior to the lien.<sup>5</sup> Where the owner executes a mortgage for purchase-money simultaneously with his first acquisition of ownership, the mechanics' lien cannot have priority over such mortgage, whatever may have been the time when the work was commenced.<sup>6</sup> Although the lien of a mechanic is declared to be superior to a mortgage made and recorded subsequently to the date of the contract, yet where an owner made an oral contract to sell land to B. and

<sup>1</sup> *Rees v. Ludington*, 13 Wis. 276.

<sup>2</sup> *Lamb v. Cannon*, 38 N. J. L. 362; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Nat. Bank of Met. v. Sprague*, 20 N. J. Eq. 13, affirmed, also 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 242; *Gibbs v. Grant*, 29 N. J. Eq. 419; *Paul v. Hoeft*, 28 N. J. Eq. 12; *Clark v. Butler*, 32 N. J. Eq. 664.

<sup>3</sup> *National Bank of the Met. v. Sprague*, 20 N. J. Eq. 13.

<sup>4</sup> [*Ettridge v. Bassett*, 136 Mass. 814, 317.]

<sup>5</sup> [*Oliver v. Davy*, 34 Minn. 292, 294.]

<sup>6</sup> [*Steininger v. Raeman*, 28 Mo. App. 594.]

gave him immediate possession, and the latter soon after made a contract with a mechanic to repair and enlarge the building, and after this the owner gave B. a deed, and at the same time B. gave the owner a mortgage upon it, both being dated as of the day when the parol contract of sale was made, but the mechanic began work under his contract before the deed and mortgage were given, and continued work afterwards, it was held that, on these facts, a judge, who tried the case without a jury, might properly find the seisin of B. was instantaneous and in conformity to the terms of their unwritten contract, and rule that the owner's right under the mortgage had priority to the mechanics' lien.<sup>1</sup> So a mortgage by a purchaser to a third person for the amount of the purchase-money, contemporary with the conveyance from the vendor, is entitled to a fund raised by sale of the mortgaged premises in preference to lien creditors, whose contracts were prior to the mortgage, but made while the contractor had but an equitable interest under a contract with the vendor.<sup>2</sup> A vendor's lien reserved in the deed, which is duly recorded, is notice to mechanics, and they will be postponed to a party who has purchased the notes of the vendor.<sup>3</sup>

§ 246 *a*. **When Mechanics' Lien is Superior to Vendor's.**—If the vendor should surrender his lien, and the mechanics' lien should attach, the former will be unable to regain his priority. Thus, where a mortgage was given for purchase-money, and it was agreed therein that the mortgagee should release part of the same upon delivery of new mortgages for such sums as might be fairly proportioned to the whole sum, and in the interval the mortgagor erected a building, it was held that the lien of the mechanic was prior to the new mortgages, notwithstanding they were for purchase-money.<sup>4</sup> So if the vendor, after the contract for the building is made, loans the purchaser money, and gives a new bond for a deed to be made upon the payment of the original price and the sum thus loaned, the vendor, as to the sum thus loaned, will be a subsequent encumbrancer on the building as to the mechanic, under a law that declares that "no incumbrance on the land, created before or after the making of the contract, shall operate upon the building," etc.<sup>5</sup> Though the vendee of land, at the same time the conveyance to him is executed, mortgages the land to the vendor to secure the purchase-money, and the mortgage is duly recorded at once, the vendee,

<sup>1</sup> Perkins v. Davis, 120 Mass. 408.

<sup>2</sup> Weldon v. Gibbon, 2 Phila. 176.

<sup>3</sup> Wood v. Rawlings, 76 Ill. 206.

<sup>4</sup> Kittredge v. Neumann, 26 N. J. Eq. 195.

<sup>5</sup> Hickox v. Greenwood, 94 Ill. 266.

having an absolute deed of conveyance, is the owner, within a lien law that secures mechanics "in building on any real estate of their employers," and when this lien is declared inferior to certain enumerated liens, and among which are "claims for purchase-money due persons who have only given bonds for titles, and the said lien shall be superior to all other liens not herein excepted," a prior recorded mortgage for the purchase-money, where the mechanic has not actual notice of its existence, will be postponed to the mechanic.<sup>1</sup> Where a vendor accepts from the vendee, as security for part of the purchase-money, a mortgage on the property subject to a prior mortgage by the vendee to a third party, he holds it also subject to a mechanics' lien in favor of a contractor of the vendee, which attached prior to the lien of the first mortgage.<sup>2</sup> Where land is sold and a mortgage back is given after B. has begun to furnish materials for a building on the land, B.'s lien takes precedence of the mortgage, though not filed until after the mortgage is executed.<sup>3</sup> In Nebraska a vendor making an absolute conveyance has no lien for the unpaid purchase-money, and if a mortgage for such money is made after a contract of the vendee for building materials, which contract was subsequent to said absolute conveyance, the mechanics' lien is superior to the mortgage.<sup>4</sup>

§ 247. **Rights of Vendor and Mechanic.** — Whenever the mechanic has entered upon his building contract with full knowledge of the rights of the vendor, he cannot claim to hold any greater estate in the premises than the person who employed him possessed. Therefore, where a grantor of ground, let on a perpetual lease for the purpose of being built upon, enters for non-payment of the ground-rent, he will hold paramount to mechanics' liens.<sup>5</sup> And where the owner of a lot contracted to sell it, and reserved "the right to sell the lot to any other person without further notice, time being of the essence of this agreement," if the purchase-money was not promptly paid by the vendee; the vendee went into possession, and employed a mechanic to do certain work thereon; on the day before the maturity of the purchase-money, a third party, *bona fide* and with the consent of the vendee, purchased the property, paying therefor the same purchase-money due from the vendee; this vendee was subrogated to all the rights of the original owner, and his title was superior to the mechanics' lien.<sup>6</sup> So, where a

<sup>1</sup> *Tanner v. Bell*, 61 Ga. 584.

<sup>2</sup> *Reilly v. Williams*, 47 Minn. 591.]

<sup>3</sup> *Avery v. Clark*, 87 Cal. 619.]

<sup>4</sup> [*Ansley v. Pasahro*, 22 Neb. 662.]

<sup>5</sup> *Bridwell v. Clark*, 39 Mo. 170.

<sup>6</sup> *Logan v. Taylor*, 20 Iowa, 297.

vendor sold ground to a purchaser, and gave his bond to make title when the consideration-money was paid, and the vendee went into possession and made improvements, and subsequently found he was unable to pay the purchase-money, it was lawful for the vendee and vendor to rescind the contract. The mechanic, however, had the privilege to tender to the vendor the purchase-money, and thus to have redeemed the property from the prior lien, and to have saved his debt by its enhanced value.<sup>1</sup> Where land is sold and a bond given for title when the purchase-money is paid, a mechanic who builds on the land at the request of the vendee may compel a sale of the land to pay the purchase-money first, and then his debt. And while the mechanics' lien will not supersede a previous lien for unpaid purchase-money, it will hold against a subsequent purchaser from the person who procured a building to be erected.<sup>2</sup> So it will avail against the interest of the vendee after the vendor has been paid; and if, after the vendor has notice of the mechanics' lien, he repurchase from the vendee, for a price greater than the purchase-money due, the lien will attach on the excess, and he will be adjudged to apply it to the satisfaction of the mechanics' lien.<sup>3</sup> If the law provide that "the lien for materials or work shall attach to the buildings and erections for which they were furnished, or the work was done, in preference to any prior lien, or encumbrance, or mortgage upon the land," as to the land the priority of the lien of the vendor is not disturbed; but as respects the buildings, erections, etc., for which the materials were furnished, the lien of the mechanic has preference to any prior lien on the land.<sup>4</sup> Where encumbrancers have priority on the land to its value as against subsequently contracting mechanics, and mechanics have priority on the improvements, and a contract for the sale of real estate was on record, showing that the same had not been paid for at the time that mechanics had entered into contracts for work, the liens of the latter will be postponed, as far as the land independent of the improvements is concerned, to the lien of the vendor for the purchase-money; and though the vendor may, after the work had been expended, convey the land and take the notes of the purchaser secured by deed of trust; as to the improvement he will be subsequent.<sup>5</sup>

<sup>1</sup> Callaway v. Freeman, 29 Ga. 408.

<sup>2</sup> Gillespie v. Bradford, 7 Yerg. (Tenn.) 119.

<sup>3</sup> Cochran v. Wimberly, 44 Miss. 503.

<sup>4</sup> Stockwell v. Carpenter, 27 Iowa,

<sup>5</sup> Wing v. Carr, 86 Ill. 347.

*Judgment Creditors, etc. :—*

§ 248. **Priorities between Judgment Creditors and Mechanics.**<sup>1</sup>—The priorities which obtain between encumbrancers and mechanics are the same between judgment creditors and mechanics. No distinction is ordinarily made between the prior lien of a judgment and that of a mortgage. It is the duty of mechanics, in reference to the former as well as the latter, to satisfy themselves, by an examination of such public records as exist, that the property they propose to enhance in value by their labor and materials will respond primarily to their claims. If they fail in this duty to themselves, they must suffer the consequences of their ignorance or neglect. Accordingly, where the owner of a house and lot, being in possession, contracted with a mechanic for repairs, and granted the rents and profits to accrue in payment thereof, and subsequently, while the work was in progress, it was sold on execution under a prior judgment against the owner; as to all work done before the sale, the purchaser under the judgment was not responsible. Nor does the fact that a judgment creditor knew that improvements were being placed on land subject to his judgment lien, require of him, in the absence of special statute, any more than of a mortgagee, to give notice to the mechanic that he will not be responsible for them. Nor is his lien, when the judgment itself is an encumbrance on land, affected by the circumstance of the plaintiff not proceeding to enforce it until a subsequent lien has been obtained; nor by an order of the plaintiff to return the execution without a levy, or without a sale of the property levied upon, unless there is some statute making these steps necessary.<sup>2</sup> So, too, like a mortgage; in the absence of contrary provisions, if a judgment be obtained before a building is commenced, it operates afterwards upon the accumulated value of the owner's interest in the land, to the exclusion of the mechanic's. It was said, if they did not wish to have been subordinated to the lien of others, they need not have performed the labor.<sup>3</sup> A lien created by the institution of a suit to subject the equitable title to real estate to the satisfaction of a judgment, after return of "no property found," has preference over liens created after the institution of the suit.<sup>4</sup> Although a judgment may be erroneous, yet all acts done under it before reversal will be binding in favor of *bona*

<sup>1</sup> This section was cited with approbation in *Macintosh v. Thurston*, 25 N. J. Eq. 246.

<sup>2</sup> *Watkins v. Wassell*, 15 Ark. 73.

<sup>3</sup> The case of *John Van Devender*, 2 Browne (Penn.), 304.

<sup>4</sup> *Jones v. Jeffress*, 11 Bush (Ky.), 636.



*fide* purchasers. For example, in an action brought to foreclose a lien upon a canal for labor and materials furnished in constructing it, the court, having jurisdiction of the parties and subject-matter, passed upon the amount of the indebtedness of the canal company to the complainant, upon the existence of the lien asserted, and its extent, and adjudged that the lien extended to the entire flume and canal; and it decreed the sale of the property in case payment of the complainant's demand was not made by a day designated. The payment was not made, and the sale took place, the master following in all particulars the direction of the decree. His report of the proceedings was not excepted to, and confirmed. The complainant was mentioned in the decree as a possible bidder, and provision made for crediting his bid on the amount adjudged due to him. The master reported that the assignee of the complainant became the purchaser, and when the report was confirmed the master was directed to execute to him a deed of the property; and it was held that the purchaser acquired a title to the premises which could not be divested by a reversal of the judgment, although such reversal proceeded upon the ground that the lien established by the complainant extended to a portion of the canal only, and that the judgment was erroneous in directing the whole to be sold.<sup>1</sup> So where the lien of a judgment was suspended by an order vacating the judgment, when such order ceases to have any validity by being vacated, the lien is revived as though it had never been suspended. But as to *bona fide* purchasers, and those standing in a similar relation, and as to all transactions and proceedings influenced or affected injuriously by the vacation of the judgment, it is operative and binding, notwithstanding its erroneous character. The term *bona fide*, as applied to purchasers, mortgagees, and encumbrancers, includes only such persons as have parted with value, or who will sustain some injury by reason of the entry vacating the judgment on the docket, and its subsequent restoration as a lien.<sup>2</sup> But a judgment at law entered upon the lien, the lien claim not having been filed pursuant to the statute, gives it no priority in payment, or advantage over liens upon which judgment has not been rendered. The order of priority of the encumbrances is in no wise affected by the judgment to enforce the lien.<sup>3</sup> Laborers and employees of a manufacturing corporation are preferred

<sup>1</sup> South Fork Canal Co. v. Gordon, 2 Abb. (U.S.) 479.

<sup>2</sup> King v. Harris, 34 N. Y. 330.

<sup>3</sup> Morris Co. Bank v. Rockaway M. Co., 16 N. J. Eq. 150.

creditors to the amount of fifty dollars each for service within six months in case of seizure of the corporate property or suspension of its business by action of or for creditors, and a creditor to whom an insolvent corporation conveys its property takes subject to the lien of the employees.<sup>1</sup> Creditors obtaining a general equitable lien against an insolvent corporation on funds brought into court, have a lien only against the company and its shareholders, and not against those who have specific prior liens on the corporate property, created before the court received the fund.<sup>2</sup> The right to enforce the lien of a laborer accrues when the work is completed, but the mere existence of the lien does not permit the laborer to come into court and claim money arising from sale of property on execution in favor of another creditor. In order to do that there must be a judgment of foreclosure and process issued thereon at the time of the creditors' sale.<sup>3</sup>

§ 249. **Attachments.** — So, an attachment lien is superior to a mechanics' lien for labor and materials, the earliest item of which is subsequent to the date of the attachment. The levy of the execution on real estate attached on a writ operates as a statutory conveyance made at the date of the attachment.<sup>4</sup> But where the plaintiff contracted with A. to build a house for him, and had partly erected it, when A. conveyed the premises to B., who thereupon agreed with the plaintiff to assume the contract and pay what then remained unpaid on the contract-price, and an extra sum for certain extra work which the plaintiff also agreed to do for him upon the job, upon the completion of the house, and, shortly after, C. attached the premises as the property of A., the plaintiff, notwithstanding, proceeded to finish the house as agreed, and on its completion filed his certificate of lien, it was held that he was entitled to a decree against C., who afterwards levied his execution on the premises, establishing his lien to the full amount to which he was entitled under his contracts with both A. and B.<sup>5</sup> If an act provide "that the liens shall be preferred to every other lien or encumbrance which shall have attached upon the property subsequent to the time when the work was commenced or materials furnished," the lien of a sub-contractor takes precedence over a garnishment served on the owner against the head contractor, after the work was

<sup>1</sup> [Bass v. Doerman, 112 Ind. 390.]

<sup>4</sup> First Nat. Bank of Salem v. Redman,

<sup>2</sup> [Farmers' L. & T. Co. v. Canada, &c. 57 Me. 405.  
R. Co., 127 Ind. 252.]

<sup>5</sup> Bank of Charleston v. Curtiss, 18

<sup>3</sup> [Cumming v. Wright, 72 Ga. 767; Conn. 347.  
Love v. Cox, 68 Ga. 269.]

commenced, but before the filing and serving notice of lien.<sup>1</sup> But in Wisconsin a garnishment of the owner as a debtor of the contractor, before the sub-contractor gives notice of his lien, takes precedence of such lien.<sup>2</sup> In New York under the Mechanics' Lien Law of 1885 (chap. 342, Laws of 1885), the filing of the prescribed notice originates the lien, and until this is done the laborer or material-man has no preferential right to be paid out of the sum due the contractor from the owner of the building. If, before the notice is filed the contractor assigns to a creditor, in payment of his debt, the whole or any portion of the moneys due or to become due to him on his contract, the assignor is entitled to the same in preference to the lienor.<sup>3</sup> If before the lien is filed, another creditor pursuing the usual remedies for the collection of debts, has acquired a legal or equitable right to have the debt applied in satisfaction of his claim, this right is not overreached by liens subsequently filed under said act, save where priority is given by the provisions of the act (§ 5), which gives a lienor who has filed his notice priority over any conveyance or judgment not recorded or docketed at the time of filing the notice, and over advances subsequently made on any mortgage on the premises, and also over the claims of general creditors under a general assignment for the benefit of creditors made within thirty days before the filing of the notice of lien. Therefore as between a receiver, appointed in supplementary proceedings, against the contractor, and a lienor who filed his lien after the commencement of the proceedings, but before the appointment of the receiver, the title of the latter antedates the lien, and he has the prior right to the debt.<sup>4</sup> The lien of a mechanic does not, however, prevent an attachment as between creditors. The mechanic alone can assert his lien to defeat the attachment, and the amount of his lien being subsequently paid, the surplus is bound by the attachment.<sup>5</sup> Courts are bound to take notice of the fractional parts of a day in determining the priority of liens where several have been obtained on the same day,<sup>6</sup> and parol evidence may be received for this purpose.<sup>7</sup>

§ 250. **Homestead and Exemption Rights, etc.**<sup>8</sup> — The same rules apply between mechanics and other statutory lien claimants. As where a builder has a lien anterior and superior to a

<sup>1</sup> Tuttle v. Montford, 7 Cal. 358; [Jones v. Church of the Holy Trinity, 15 Neb. 82; Eastman v. Newman, 59 N. H. 581.]

<sup>2</sup> [Dorestan v. Krieg, 66 Wis. 604.]

<sup>3</sup> [Stevens v. Ogden, 130 N. Y. 182; McCorkle v. Herrman, 117 N. Y. 297.]

<sup>4</sup> [McCorkle v. Herrman, 117 N. Y. 297, 304.]

<sup>5</sup> Patterson v. Perry, 10 Abb. Pr. 82.

<sup>6</sup> Safford v. Douglas, 4 Edw. Ch. 537.

<sup>7</sup> Brainard v. Bushnell, 11 Conn. 16.

<sup>8</sup> [See § 183 a.]

homestead, he may enforce the same without any reference whatever to such homestead right, and the homestead claimant cannot be permitted to exercise a right of selection of the land which he regards as his homestead, so as to interfere with the enforcement of the lien.<sup>1</sup> So, an exemption law which extends its provisions "to judgments obtained upon a contract," is not operative against mechanics' liens, as to allow debtors to hold possession of buildings, or to take the proceeds of them, without paying the mechanics and material-men for the materials furnished and work done in erecting them.<sup>2</sup> But a statute which declares a tax to be a lien, and to have a priority over "any recognizance, mortgage, judgment, debt, obligation, or responsibility," mechanics' liens are subordinated to it.<sup>3</sup> A duly existing mechanics' lien will hold its legitimate priority in the distribution of a bankrupt's estate.<sup>4</sup> The Alabama code expressly provides that the homestead exemption shall not be construed to prevent a mechanics' lien for work or materials. If the work is done or materials furnished on the personal security of the debtor the prohibition does not apply, but if there be a lien, whether created by contract or arising under the lien laws, such lien constitutes the claim a privileged debt against which the right of exemption cannot be asserted.<sup>5</sup> A similar provision is made in the Arkansas constitution. Mechanics' liens for improving the homestead are expressly excepted from the exemption.<sup>6</sup> In Texas, a lien may be created on a homestead, but it cannot be enforced by sale of the property so long as the homestead use continues. If this has ceased at the date of the sale, however, the enforcement of the lien is valid.<sup>7</sup> In order to create a lien on a homestead the contract must by statute be in writing with consent of the wife, as in making a sale.<sup>8</sup> And the contract must be in writing before the work is done or material furnished. A writing after the service, though containing an express agreement for lien, will not affect the homestead.<sup>9</sup> The lien of a material-man takes precedence of a homestead declared after the materials were furnished, but before claim of lien. The lien dates from the time of furnishing. Any other construction would enable the owner to work a

<sup>1</sup> Tuttle v. Howe, 14 Minn. 145.

<sup>2</sup> Lauck's Appeal, 24 Penn. St. 426.

<sup>3</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

<sup>4</sup> London v. Blandford, 56 Ga. 150.

<sup>6</sup> [Tyler v. Jewett, 82 Ala. 93, 100.

<sup>6</sup> [Anderson v. Seamans, 49 Ark. 475, 480.]

<sup>7</sup> [Inge v. Cain, 65 Tex. 75.]

<sup>8</sup> [Huff v. Clark, 59 Tex. 347; Reese v. Corlew, 60 Tex. 70.]

<sup>9</sup> [Taylor v. Huck & Co., 65 Tex. 238.]

fraud on the material-man.<sup>1</sup> If the materials began to be furnished before the premises became a homestead, the entire lien under the contract is prior to the homestead right.<sup>2</sup> Where there is a homestead of eighty acres in a farm of ninety-two acres, then a mechanics' lien, and afterward a mortgage of the whole land, the homestead eighty acres are exempt from the mechanics' lien, so that in respect to them the mortgage is superior to the lien.<sup>3</sup> A homestead is exempt from mechanics' liens by the constitution of North Carolina.<sup>4</sup> A mechanics' lien was filed against the improvement, and the land on which the improvement was; and judgment was recovered on the lien. As to the improvement, the lienor was entitled to priority over, but as to the land his claim was subordinate to another lien filed against the premises for an earlier improvement, and it was held that, by proceeding against the land and improvement, the lienor lost his priority.<sup>5</sup>

<sup>1</sup> [Lumber Co. v. Gottschalk, 81 Cal. 642, 648.]

<sup>2</sup> [Smith v. Headley, 33 Minn. 384.]

<sup>3</sup> [Talbot v. Barager, 37 Minn. 208.]

<sup>4</sup> [Cumming v. Bloodworth, 87 N. C. 83, 85.]

<sup>5</sup> [State v. Drew, 43 Mo. App. 362.]

## CHAPTER XXI.

## LIEN-HOLDERS, INTER SE.

§ 251. **Equality among Mechanics, though not specially provided by Statute.** — As a general rule, no priority exists among lien-holders claiming under mechanics' lien laws. The legislation of the States has almost universally adopted the equitable doctrine of equality. Such equality should be favored. The idea upon which the law proceeds is that the building is the result of the labor and materials of various persons, — material-men, stonemasons, bricklayers, carpenters, painters, etc. The work of some of these must precede that of others, but each contributes his proper share to the value of the structure. Its value, when finished, is derived from these several contributions. It is not the product of one man's materials or another man's labor, but is the result of the contributions of all. All, then, should share its proceeds. There is no good reason why the man who, of necessity or by accident, begins before another, should have priority. The painter and glazier may add far more to the value of the building than the mason, who merely lays the foundation; yet, if priorities exist, they may get nothing whatever, while the latter is fully paid. The bricklayer and carpenter usually commence about the same time; and if priorities are allowed, the accident of one beginning a day before the other may give a ruinous advantage. So that where the scope of the act indicates there are to be no priorities among mechanic lien-holders, such interpretation will be given to the act, though it is nowhere expressly so declared; as where no provision is made for priority among such lien-holders, when a provision for priorities is made as to other encumbrancers. So, if payment be prescribed in proportion to the several demands of the lien-holders.<sup>1</sup> In another case it was held that under a law in which there is nothing that gives priority to the mechanic who makes the first contract or first commences work, he has no preference

<sup>1</sup> Choteau v. Thompson, 2 Ohio St. 114; Hazard Pow. Co. v. Loomis, 2 Disney (Cin.), 544.

over others commencing subsequently. It cannot be said that the legislature meant to give a preference, when nothing in the language employed implies such an intention. On the contrary, it has been said the rule of equality is equity. And when the statute makes no distinction among lien-holders, and as there is no reason founded in justice for making it, the courts have no authority for discriminating between them. This is particularly the case when the statute directs the property to be sold and the proceeds applied to all without preference.<sup>1</sup> Liens for labor and materials are therefore entitled to be paid *pro rata*;<sup>2</sup> and if there be mechanics and material-men who have liens, and the proceeds of sale of the property are insufficient to pay the whole, in consequence of materials which had been furnished having been misappropriated, they must be paid in proportion to the respective amounts, and the loss be divided between them.<sup>3</sup> The statutory provision for the *pro rata* apportionment of the proceeds of the sale of the property subject to mechanics' liens must be confined to cases, wherein the materials were furnished or labor was performed in the construction of one building or buildings constituting one improvement; and constructed at or about the same time, and, therefore, the statute does not apply to liens for materials furnished for different improvements erected at different times on the same premises.<sup>4</sup>

§ 252. **When Equality is provided by Statute.**—So where the statute declares that workmen and material-men shall have a "joint lien," the intention is to place all upon an equality, each in proportion to his claim for labor or materials.<sup>5</sup> Under a law that, "upon questions arising between different creditors, no preferences shall be given to him whose contract was first made," by "creditors" is meant such as claim a lien under the provisions of the act itself, and not prior or other encumbrancers.<sup>6</sup> And although by the civil law of Louisiana it is provided that "architects, contractors, . . . and those who have supplied the owner with materials for the construction and repair of his buildings, . . . preserve their privileges only in so far as they have recorded with the register of mortgages the act containing the bargains they have made," etc., where these contracts are duly recorded they create concurrent privileges upon the build-

<sup>1</sup> Crowell v. Gilmore, 18 Cal. 370.

<sup>4</sup> [State v. Drew, 43 Mo. App. 362.]

<sup>2</sup> Anshutz v. McClelland, 5 Watts (Penn.), 487; Moxley v. Shepard, 3 Cal. 141.

<sup>5</sup> Longest v. Breden, 9 Dana (Ky.),

<sup>3</sup> Wallace v. Melchoir, 2 Browne (Penn.), 104.

<sup>6</sup> Kimball v. Cook, 6 Ill. 423.

ing in favor of the contractors respectively. The recording of the contracts is not governed by date of registration, as mortgages are. In large undertakings there are sometimes many contracts, and necessarily of different dates. It cannot be contended that these last undertakers, because of later dates, would have to give way to others previously recorded. This is not the sense of the above law. Materials are not all furnished on the same day; nor labor performed at the same time; yet the laborers and furnishers of materials, *inter se*, must share the fund *pro rata*.<sup>1</sup> A mechanics' lien embraces the whole structure, and what one furnishes becomes in turn subject to all liens of his fellow-mechanics, which attached earlier.<sup>2</sup> And accordingly, when "a *pro rata* distribution" is to be made to several mechanics, who have recovered judgment out of the proceeds of a sale made by a sheriff of the property subject to the liens, if one of the creditors receive from the sheriff more than his *pro rata* share of the proceeds, the other creditors may have a right to sue for the excess; but the suit cannot be brought in the name of the sheriff, because the latter has no such right.<sup>3</sup> The sale, however, by the sheriff upon any one of the lien claims divests the liens of all, and the purchaser will hold it discharged of the encumbrances.<sup>4</sup> But, where a statute is silent as to the priority of lien-holders *inter se*, but gives each lien-holder the right to proceed and issue execution and sell without making others parties, it follows necessarily that the lien claims take precedence from the time of their filing.<sup>5</sup>

§ 253. **Applies only to those in the Same Class.**—This right of equality is to be understood as appertaining only to those who stand in the same class. For though a statute provides that mechanics' claims shall be paid *pro rata*, where the fund arising from the sale of the building is insufficient to pay all, the contractor who employs the mechanics and material-men cannot claim *pro rata* with them, although he may have filed a lien. Such contractor can receive nothing in the distribution of the proceeds of the sale of the building until the lien creditors employed by him, and to whom he is personally responsible, have been paid in full.<sup>6</sup> Neither would this rule of equality apply if some mechanics began work before a mortgage was

<sup>1</sup> Jamison v. Barelli, 20 La. An. 452; Hale v. Wills, 3 La. An. 504; Whitla v. Taylor, 6 La. An. 480.

<sup>2</sup> Equitable Life v. Slye, 45 Iowa, 615.

<sup>3</sup> Buchter v. Dew, 39 Ill. 40.

<sup>4</sup> Anshutz v. McClelland, 5 Watts (Penn.), 487.

<sup>5</sup> Hall v. Hinckley, 32 Wis. 362; Dobbs v. Green, 2 Wis. 223; Dobbs v. Enearl, 4 Wis. 451.

<sup>6</sup> Lay v. Millette, 1 Phila. 513.



executed by the owner of the property, and some afterwards. In such case the first lien-holders would have priority over the mortgagee, while the latter would not. The first class would be paid in full before the mortgagee, then the mortgagee, then the last class, each mechanic lien-holder having equal claims with the others of his class.<sup>1</sup> Thus, if A. commence work or the furnishing of materials, and afterwards the owner mortgages the premises to C., and after this D. and E. begin to work or to furnish materials, here A. has priority over C., and C. has priority over D. and E.; yet if C. were out of the way there would be no priority among them. In such case A. must receive what he would be entitled to if C.'s mortgage had no existence, the residue must be applied to the satisfaction of the mortgage, and whatever may remain after that must be distributed to D. and E. *pro rata*.<sup>2</sup> The lien of a contractor is postponed to that of a sub-contractor under him, though the latter was filed later, and the contractor's assignee stands in his shoes.<sup>3</sup> So in Texas a sub-contractor's lien is superior to the contractor's lien in his own hands, or the hands of his assignee.<sup>4</sup> So in North Carolina a sub-contractor, upon filing notice of his claim within twelve months after completion of the labor or final furnishing of material, has a lien that is superior to all other liens attaching subsequent to the time when the work was commenced or the materials furnished, and superior to the contractor's lien.<sup>5</sup> A principal contractor cannot defeat the liens of those he employs by acquiring what would in other hands be a superior lien.<sup>6</sup>

§ 254. **Cannot dispute Settlements between Owner and Other Lien-holders, when Bona Fide.** — It is too well settled to admit of dispute, that if full performance in minor particulars be dispensed with by the party to whom it is due, this will not prevent the builder from filing his lien on the contract, as between lien creditors. In the absence of fraud, creditors have no right to rip up the settlement of the parties. If they could do that, they might invalidate the lien because the original contract was too liberal in price. Self-interest, in the absence of fraudulent motives, is regarded by the law as a sufficient guaranty that men will not pay, or agree to pay, more than they ought to pay when liquidating their transactions, or agree that contracts in their

<sup>1</sup> Crowell v. Gilmore, 18 Cal. 370.

<sup>2</sup> Chateau v. Thompson, 2 Ohio St. 114.

<sup>3</sup> [English v. Lee, 63 Hun, 572.]

<sup>4</sup> [Red River County Bank v. Higgins, 72 Tex. 66.]

<sup>5</sup> [Lumber Co. v. Hotel Co., 109 N. C. 658, 660; Lester v. Houston, 101 N. C. 605.]

<sup>6</sup> [Farmers' L. & T. Co. v. Canada, &c. R. Co., 127 Ind. 252. The principle applied to a railway construction company.]

favor are complied with when they are not; and for this reason these contracts, be they settlements or otherwise, are allowed to stand when unimpeached in their honesty. It would lead to frightful litigation if creditors might attack all liens where complete performance was defective in some inferior particular, but which the parties, judging honestly for themselves, thought proper not to insist on. Such a principle, it is said, if carried to its legitimate results, would disturb half the judgments confessed on settlements throughout the country. And therefore, where a building erected under contract is substantially completed, full performance in minor particulars may be dispensed with by the party to whom it is due; and a mechanics' lien filed by the builders thereafter is valid against other lien creditors.<sup>1</sup>

§ 255. **May contest Validity of Judgments confessed, etc.** — But in cases of fraud, and where the objection goes to the foundation of the proceeding, lien-holders may *inter se* contest the validity of the claims of other lien claimants. Thus, where a law gives to sub-contractors a right to file a lien, provided they shall, in a certain prescribed mode, give notice to the owner of the building of their intention to file a lien, and the notice was not given in the prescribed mode, it was held that the owner could not waive the defect, so as to make the lien filed a valid one as against other parties claiming liens.<sup>2</sup> So, in the distribution of the proceeds of a sheriff's sale, a judgment in a *scire facias* on a mechanics' claim is, as to other claimants, *res inter alios acta*, and not even *prima facie* evidence that it was filed within six months after the completion of the work, so as to give it relation back to the commencement of the building, in a contest with other lien claimants; otherwise mechanics might be defrauded with the greatest ease by the owners, when they become involved, by confessing judgments or allowing them to be entered against them, and it would be utterly impossible for strangers to controvert them.<sup>3</sup> Therefore an auditor is not obliged to regard as conclusive the amount of a judgment confessed on a mechanics' claim, as it might be confessed for a much larger sum than was due.<sup>4</sup> Neither is a fatal defect in a claim cured, as against lien creditors, by a subsequent confession of judgment by the owner. Such judgment takes effect only from its date, and not from the commencement of the building, as it otherwise would if the lien were valid.<sup>5</sup> Where a court is not required to adjudicate upon

<sup>1</sup> Stewart v. McQuaide, 48 Penn. St. 191.

<sup>2</sup> White v. Washington School District 42 Conn. 542.

<sup>3</sup> Norris's Appeal, 30 Penn. St. 122.

<sup>4</sup> Field v. Oberteuffer, 2 Phila. 271.

<sup>5</sup> McCay's Appeal, 37 Penn. St. 125.

the validity of the lien, or the time of its commencement, in giving judgment in a cause, the judgment record is not evidence of the existence of the mechanics' lien, of the time of its commencement, or of the quality or description of the real estate which it affects, as against third persons not parties to the suit.<sup>1</sup>

§ 256. **When no Equality between Sub-Contractors, etc.**<sup>2</sup>—As between sub-contractors and material-men furnishing materials to a contractor, not upon the order of the owner, and where they, by giving notice to the latter, may have appropriated for their own use whatever fund may then be due by the owner under the contract to the contractor, the rule of equality has not been adopted in statute, which has been seen to exist among mechanics and others having a lien directly against the building. Among these, the first in time are first in right. So that where a statute neither by its terms nor by implication assigns equality among claimants, but allows parties to fix their claims by giving notice, and has nothing to warrant the suggestion that any event subsequent to the filing of the notice could operate to destroy the lien, or reduce its amount, priorities will be established among them according to the date of their notices, although the equities of the lien-holders are in all respects equal.<sup>3</sup> Again, a law providing that each claimant shall have a "lien upon the amount due from the owner to the contractor at the date of the notice," gives priority to each claimant in the order of time in which his notice is served, and excludes the idea of a *pro rata* division of the fund among the claimants. An order by the creditor, drawn upon and presented to his debtor, to pay a sum of money out of a specified fund to a lien creditor who did not give the statutory notice, though not accepted, constitutes, in favor of the payee, an equitable assignment *pro tanto* of the fund, which will fix the fund in the hands of the debtor, and which will be protected and enforced in a court of equity. Most American courts maintain the doctrine that a valid assignment cannot be made of a part of a debt, without the assent of the debtor, which will be enforced against him in a court of law. But it has no application to an equitable assignment sought to be enforced in a court of equity, as against the fund in the hands of the debtor upon whom the order is drawn. When the debtor has come voluntarily into a court of equity with the fund, as by

<sup>1</sup> Freeman v. Cram, 3 N. Y. 305.

<sup>2</sup> Kaylor v. O'Connor, 1 E. D. Smith (N. Y.), 672.

<sup>3</sup> This section was cited with approbation in Burnett v. Jersey City, 31 N. J. Eq. 354.

bill of interpleader, and leaves the claims of the contesting parties to be settled between themselves, it does not lie in the mouths of other claimants to raise the objection against the assignment of part only of the debt. The presumption must be that the complainant assented to a subdivision of the debt. The parties who have made demand and given notice under the statute are entitled to no priority over other creditors, except what the statute gives them. It confers on mechanics and materialmen no exclusive or superior right to the fund in the hands of the owner. Each creditor, whether mechanic or otherwise, is entitled to be paid in the order in which his notice or order was presented to the owner.<sup>1</sup> Indeed the sub-contractor, by service of his notice, is subrogated only to the right of the contractor; and when the amount so due to the contractor has been in good faith previously assigned by him to another sub-contractor, in payment of a like amount due him for work, the assignment is not defeated by the service of the subsequent notice.<sup>2</sup> So, where "any sub-contractor . . . or other person who shall furnish materials . . . may deliver to the owner of such building an attested account of the amount of the work, . . . and thereupon such owner shall retain out of his subsequent payments to the contractor the amount of such work and labor, for the benefit of the person so performing the same," the sub-contractor who first delivers an attested copy of his account, if there then be in the hands of the owner a sufficient amount due to the contractor, secures a satisfaction of his demand, which can neither be defeated nor lessened by the claim of another sub-contractor. The principle that he who is "first in time, is better in right," applies also between sub-contractors and other creditors of the contractor, who garnishee the fund before the sub-contractor has served his attested account, and will take priority. It is a race of diligence between the different classes of creditors.<sup>3</sup> In Iowa mechanics' liens have priority in the order in which they are filed.<sup>4</sup> An order from the contractor upon the owner who owes him an amount sufficient to fill the order is an assignment, and the sub-contractor receiving such order and presenting it for payment takes precedence of those who subsequently file liens.<sup>5</sup>

<sup>1</sup> *Superintendent of Public Schools v. Heath*, 2 McCart. (Ch. (N. J.)) 22.

<sup>2</sup> *Copeland v. Manton*, 22 Ohio, 398.

<sup>3</sup> *McCullom v. Richardson*, 2 Handy (Cin.), 274.

<sup>4</sup> [*Robertson v. Barrack*, 80 Iowa, 538.]

<sup>5</sup> [*Lauer v. Dunn*, 115 N. Y. 405.]

## CHAPTER XXII.

## MARSHALLING, SUBROGATION, AND APPORTIONMENT.

§ 257. **Applicable to Mechanics' Liens.** — The equitable doctrine of marshalling of securities applies to mechanics' liens.<sup>1</sup> It has been objected that the lien is only statutory, and cannot therefore be enforced in any other way or to any greater extent than is given by the act creating it. But this objection is not well founded. The lien must, beyond question, be perfected in strict conformity with the law; but when so perfected, it may be governed by other rules and principles than those specially designated in it. The lien of a judgment upon real estate exists alone by force of statute, and that to the extent only of the interest of the debtor. It is nowhere provided in the statute creating it, that it shall be such a lien as courts of equity are to respect in marshalling of assets. Yet the general equitable doctrine of marshalling has always been applied to a lien of that description; and the propriety of so doing has never been questioned. If the doctrine is applied to mortgages and judgments, there can be no reason why it should not equally apply in favor of claimants holding mechanics' liens. Several cases<sup>2</sup> recognize the principle that a mechanics' lien stands upon equal ground with a mortgage, and affects legal and equitable rights to the same extent. All the equities, therefore, which render these securities available and productive are of equal application to the holders of mechanics' liens.<sup>3</sup> But mechanics' claims have no superior equities over other liens. If, as a class, they have rights to subrogation at all, it is not because they possess superior merit.<sup>4</sup>

§ 258. **Principle of Marshalling.** — The cardinal principle on which a court of equity proceeds in marshalling assets is that a creditor having his choice of two funds ought to exercise his right of election in such a manner as not to injure other creditors who can resort to only one of these funds. But if, contrary

<sup>1</sup> *Rust v. Chisolm*, 57 Md. 383.

<sup>2</sup> *Kenny v. Gage*, 33 Vt. 307; *Olympic Theatre*, 2 Browne (Penn.), 275.

<sup>3</sup> *Hamilton v. Schwehr*, 34 Md. 107.

<sup>4</sup> *Knour's Appeal*, 91 Penn. 78.

to equity, he should so exercise his legal rights as to exhaust the fund to which alone other creditors can resort, then those other creditors will be placed by a court of equity in his situation, so far as he has applied their funds to the satisfaction of his claim. Thus, for instance, where a part of an old building erected on one lot was torn down, and a building was erected adjoining and opening thereto on another lot, the court directed, in a proceeding to distribute the proceeds of sale of all the property, that two mortgages, which were given on the lot previously to the commencement of the new building, should be paid out of the proceeds of the first lot, leaving the value of the second lot and the building thereon to satisfy the mechanics' lien creditors.<sup>1</sup> So where, on 2d October, 1867, H. leased to S. two lots of ground in B., one on the corner of McHenry and Sterrett Streets, and the other on the west side of Sterrett Street, and on the same day S. executed to H. a mortgage of the same lots, to secure an existing indebtedness and advances to be made, to enable S. to erect certain houses on the Sterrett Street lot. The advances were made and the houses erected. On the 21st of February, 1868, S. executed to H. another mortgage on the same lots, to secure a further indebtedness. Between the recording of the two mortgages certain material-men filed their claims against the Sterrett Street lot. By proceeding in equity the property was sold, but the proceeds were insufficient to pay the claims of the material-men and the two mortgages. The proceeds of the McHenry Street lot were sufficient to pay the whole of the first mortgage of H. and part of the second, while the proceeds of the Sterrett Street lot were insufficient to pay the claims of the material-men. Upon the question of the proper distribution of the fund between the respective claimants, it was held that the doctrine of the marshalling of securities applied, and the material-men were entitled to the proceeds of the Sterrett Street lot, on which alone they had a lien, while the proceeds of the McHenry Street lot only were applicable to the payment of the mortgage claims.<sup>2</sup>

§ 259. **When allowed.**—The right of the creditor to marshal the assets of the debtor, for the purpose of securing payment of his debt, is absolute as against the debtor himself, and cannot be defeated by the intervention of creditors of later date.<sup>3</sup> Such a course must, however, appear to be necessary for the payment and satisfaction of both debts, and it must not operate to preju-

<sup>1</sup> Olympic Theatre, 2 Browne (Penn.), 275.

<sup>2</sup> Hamilton v. Schwehr, 34 Md. 107.

<sup>3</sup> 2 Lead. Cas. in Eq. 218.

dice the rights of the first creditor to the double fund. Neither must there be any reasonable doubt of the sufficiency of the one fund to satisfy the debt of the first creditor. If it be insufficient to pay the debt and interest due the prior encumbrancer, the equitable rule does not apply.<sup>1</sup> Under such circumstances, all that the subsequent encumbrancers can make claim to is a judgment awarding to them, after the payment of the first debt, the right, in the order of the priority of their respective liens, to be subrogated to the first encumbrancer in respect to the securities then held by him.<sup>2</sup> The fact that a lien relates back to the commencement of a building furnishes no reason why a court of equity should marshal securities to the prejudice of a *bona fide* purchaser of other property upon which the lien did not operate, and of which he had no notice.<sup>3</sup> The rule of marshalling does not apply where the prior mortgagee has a lien on two distinct estates of two separate and distinct mortgagors, and the subsequent encumbrancer holds a lien on one only of these estates, encumbered by the prior mortgage.<sup>4</sup> Nothing is better settled than that a creditor can have no right of subrogation to a demand against a third person, merely because the assets of his own debtor have been exhausted in satisfying the demand; for if such were the case, the payment of a debt by one of two joint debtors would give his creditors a right to demand repayment or contribution from the other. To sustain such a demand, the relation between the debtors must be such as to render it more equitable that the debt should be paid by one than by the other.<sup>5</sup> Where different mechanics' liens upon the same property have priority in the order in which the respective statements are filed, under a decree to allow a mechanic to redeem another lien, it was held that he could not also have the option of treating a sale as made for their benefit, and claiming a *pro rata* share of the proceeds.<sup>6</sup> A judgment, which was a lien upon two properties sold on separate executions, cannot be paid out of the proceeds of the second sale, to the prejudice of a subsequent mechanics' lien, if the proceeds of the first sale in the hands of the sheriff are sufficient to pay such judgment. The fact that the holder of such judgment has another one, subsequent in date to the mechanics' lien, which subsequent judgment will not be reached by either fund unless the prior judgment is paid out of that raised by the second

<sup>1</sup> Ayres v. Husted, 15 Conn. 504.

<sup>2</sup> Herriman v. Skillman, 33 Barb. 185.  
(N. Y.) 378; Butler v. Elliott, 15 Conn.  
187.

<sup>3</sup> Leib v. Stribling, 51 Md. 286.

<sup>4</sup> Woollen v. Hillen, 9 Gill (Md.),

<sup>5</sup> 2 Lead. Cas. in Eq. 222.

<sup>6</sup> Phelps v. Pope, 53 Iowa, 691.

sale, presents no equity to take the case out of the usual rule. . . . The appellant has two funds out of which to claim his money. One of the funds is the proceeds of the sale of the Manor township farm, which was sold by the sheriff for a sum sufficient to pay appellant's judgment in full. The money is in the hands of the sheriff, but the appellant declines to take it out. The other fund is the proceeds of the sale of the Millersville property. This property was sold by the sheriff subsequently to the sale of the Manor Farm. The mechanics' lien creditors have a claim upon this fund, but they are subsequent to the lien of the plaintiff's judgment. The appellant insists upon his right to take his money out of the latter fund. If he succeeds, he takes the only fund the mechanics' lien creditors have. The application of the familiar rule that where one creditor has two funds out of which to make his money, and another creditor has but one, the creditor having the two shall first exhaust the fund upon which the other has no claim, would throw the appellant upon the Manor Farm. This rule must prevail, unless the appellant has an equity which would make the application of the principle unjust in the particular instance. The reason why he objects to it is that he is holder of a second judgment which is also a lien upon the two properties, but as to the Millersville property it is subsequent to the mechanics' claims. Hence he desires to first absorb the Millersville fund, in which case his second judgment is good upon the Manor Farm. In this, however, he has no equity. When the mechanics put their work and materials upon the Millersville property they could see of course that it was bound by the lien of appellant's first judgment. But they also knew that the same judgment was a lien on the Manor Farm, and that said farm was amply sufficient to pay it. With this knowledge, they had a right to expect that the appellant would seek to get his money out of the farm, and not deprive them of the security of their liens. They further knew that they could compel him to do so if necessary. Is this right to be taken away because the appellant acquired another judgment which was also a lien upon both properties, and which was entered after the mechanics' liens had attached to the Millersville property? The appellant has no equity as to his second judgment, for the reason that it is subsequent to the mechanics' liens, and he cannot by tacking his two judgments together, deprive the mechanics of their equity to have the first judgment satisfied out of the Manor Farm.<sup>1</sup> Where A., B., C., and D.,

<sup>1</sup> [Kendig v. Landis, 135 Pa. 612, 619.]



in the order of superiority represented by their alphabetical sequence, have claims upon portions of a property, the whole of which is subject to a mechanics' lien superior to all the other claims, A.'s portion is to be sold last, and only when the other portions are insufficient to satisfy the mechanics' lien, and D. cannot reverse the priority by buying up the lien judgments, and having the entire premises sold, and buying them in.<sup>1</sup>

§ 260. **Subrogation in Favor of Sureties applicable to Mechanics' Liens.** — The liberal policy of equitable subrogation has been, in this country, universally extended to sureties, and nothing is better settled than that where a fund is placed in the hands of the creditor, as security for a debt, and a surety pays the debt, he is entitled to the benefit of the fund or pledge, as against the debtor, as fully as the principal himself had. It is the debt that is to be protected; and however it may be modified, or into whose hands it may come, until that is paid, the fund or pledge accompanies it, and remains for its redemption. So, if the fund or pledge be in the hands of the surety, for his indemnity, the creditor may, if he has no other remedy, compel its appropriation to the payment of the debt.<sup>2</sup> It follows as a corollary, from the principle that the surety is entitled to the benefit of all the securities for the debt taken by the creditor from the principal debtor, that the surety is discharged from liability to the extent to which the creditor has parted with these securities. The same principles are applicable to mechanics' lien claims. And although the defence grows out of an equitable and not a legal right, yet, under the system of procedure in many States, it may be relied upon as a defence to a suit upon the legal liability, if all the necessary parties are before the court. Thus, a builder having agreed to erect a house for an owner of land, payment for the same to be made sixty days after completion, and a party became surety for the builder, if the owner, after notice of sub-contractors, pay to the builder before the completion of the building, and the owner is subsequently compelled to pay the sub-contractors, he cannot resort to the surety of the builder for indemnity against the breach of the builder's contracts with the sub-contractors, on the general principle above stated. The owner, having notice of the claims, and paying what by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which,

<sup>1</sup> [Acquackanonk Water Co. v. Manhattan L. Ins. Co., 36 N. J. Eq. 586.] 381 ; Pettibone v. Stevens, Id. 19 ; Mathews v. Aikin, 1 N. Y. 595.

<sup>2</sup> Belcher v. Hartford Bank, 15 Conn.

according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself.<sup>1</sup> So a bank which holds a claim primarily for its own security, and next for the indemnity of others, has no right so to deal with it as to impair that indemnity; and when it does so impair it, and renders it entirely unavailable to all parties, the bank is bound to account to the parties injured for the amount of that claim.<sup>2</sup> As a part of this equitable principle of subrogation, and dependent upon its justice, is the privilege of a subsequent lien-holder to discharge prior liens and incumbrances, and be substituted to the rights arising under them.<sup>3</sup>

§ 261. **Apportionment applicable to Mechanics' Liens.** — Analogous to the preceding propositions, and arising from the general principle that in equity all creditors are equally meritorious, if there are several funds, and some creditors have liens on one fund and some on another, and there is one creditor having a general lien on all the funds, equity will not permit this creditor to take his whole claim out of one of the funds, but will apportion his indebtedness among all, and compel him to take *pro rata* out of all the funds.<sup>4</sup> Accordingly, where several houses were built under one contract with a builder, on several lots or parcels of land on which encumbrances had previously existed, and which, after the erections, had passed into the hands of different owners, a court of equity can undoubtedly, upon the maxim *qui sentit commodum, sentire debet et onus*, so apportion the burden that each shall bear his proper part in discharge of the common obligation; and it may be that a court of equity, when exercising jurisdiction for the enforcement of mechanics' liens, in a proper case, if the necessary parties be before it, might so adjust its judgment upon the foreclosure of the lien as to equalize the burden among the separate owners of the different lots, so far as it could be done consistently with the due enforcement of the rights of the mechanic.<sup>5</sup> And where, under a law that "all and every dwelling-house . . . shall be subject to the payments of the debts contracted for . . . the erection and constructing of such house," etc., and by a supplementary act, "that no judgment rendered in any *scire facias* shall warrant the issuing an execution except against the building or

<sup>1</sup> Taylor v. Jeter, 23 Mo. 244.

<sup>2</sup> Chester v. Kingston, 17 Barb. (N. Y.) 489.  
271; Insurance Co. v. Woodruff, 2 Dutch.  
(N. J.) 541.

<sup>3</sup> Russell v. Howard, 2 McLean, C. C.

<sup>4</sup> Semmes v. Boykin, 27 Ga. 47.

<sup>5</sup> Paine v. Bonney, 6 Abb. Pr. (N. Y.)  
101; s. c. 4 E. D. Smith, 734.

buildings upon which the lien existed as aforesaid," it was held that a claim for work done, under a general request and without specific contract, might be filed against several houses jointly, when they were owned by the same person, or that the claimant might apportion the amount among them, according to the value or price of the materials or work, and file a separate claim against each; it was further stated that, in case of a joint lien, each house or building bound by it was liable for the whole amount thereof; and where there were other mechanics' liens, some joint and others several, all of equal date, the money arising from a judicial sale of the houses had to be marshalled and appropriated in such manner that the proceeds of no one of them should be appropriated to the discharge of any subsequent lien, as long as any portion of a prior lien, either joint or several, upon the same house remained unsatisfied.<sup>1</sup> Where two blocks of houses built under the same contract are not divided by a public street or alley, but by a private alley, the right to which belongs to both blocks, there is not such a severance as will prevent an apportionment of a lien-claim amongst the several houses.<sup>2</sup>

§ 262. **Instances of Apportionment.** — But where an act provided that "in every case in which one claim for materials shall be filed by the person preferring the same against two or more buildings owned by the same person, the person filing such joint claim shall, at the same time, designate the amount which he claims to be due to him on each of such buildings, otherwise such claim shall be postponed to other lien creditors; and the lien of such claimant shall not extend beyond the amount so designated, as against other creditors having liens by judgment, mortgage, or otherwise;" and a bank held a mechanics' lien against three adjoining lots and buildings of \$9,000, being \$3,000 on each lot and building, to secure a debt due to it of less than \$6,000; and upon one of the lots and buildings having been sold, the bank did not claim any part of the proceeds, and they were distributed to other lien creditors, and afterwards a second lot and building were sold, and the proceeds being in court for distribution: it was held that the mechanics' lien only was to be regarded as apportioned upon the lots and buildings, and not the debt due the bank; and that the failure to claim the proceeds of one of the lots sold did not impair the right of the bank to claim its debt out of any other lots, to the extent of its lien

<sup>1</sup> *Pennock v. Hoover*, 5 Rawle (Penn.), 319.

<sup>2</sup> *Fitzpatrick v. Allen*, 80 Penn. 292.

upon that particular lot; and that a relinquishment of their right to the proceeds of the one lot did not debar them from claiming their whole debt from the sale of the remaining lots, it being less in amount than their lien security upon such lots.<sup>1</sup> In *scire facias* on an apportioned lien it is not necessary for the claimant to show that material to the amount of the apportionment was used for the specific property described.<sup>2</sup> And where the words of the statute are that the person performing labor or furnishing materials in building "any house" shall have a lien for the value of such labor or materials, "upon such house," and under a single contract the lienor has furnished materials to the owner equally for seven houses, and one of such houses had been conveyed away by the owner before the filing of the notice of lien, the claim was valid as a lien upon the remaining six houses only for what went to their erection, namely, their proportionate part of the whole claim (six-sevenths), although some payments had been made by the owner on general account; as there is no principle of construction which would authorize the right of lien, which was lost by the sale and transfer of that house, or rather which had not been created by the filing of the notice when that sale and transfer took place, to attach to the other six houses by the filing of the notice.<sup>3</sup>

§ 263. **Apportionment between Land and Buildings.** — Some States, as a means of preventing fraud upon lien claimants and at the same time doing no injustice to prior encumbrancers, have by statute apportioned the proceeds of the sale of the house and lot by assigning to the encumbrancer the value of the lot, and to the mechanics the improvements erected by themselves; in which case a sale and conveyance of such land to an innocent purchaser, for valuable consideration, without notice, will not prevent the lien of the mechanic from attaching to the building erected by his labor or with his materials;<sup>4</sup> but the title of the purchaser will have priority as to the land. An important question in such case arises when a sale is made of the entire property, — how is the relative value of the building and the land to be ascertained. In one case it was said, it is clear that the value of the building and lot should be ascertained by the same standard, and that value should have relation, as near as may be, to the time of the sale. The true measure of equity

<sup>1</sup> Bank of Pittsburgh's Appeal, 29 Penn. St. 330.

<sup>2</sup> Hershey v. Gohn, 1 Pennypacker (Penn. Sup. Ct.), 40.

<sup>3</sup> McAuley v. Mildrum, 1 Daly (N. Y.), 396.

<sup>4</sup> Buchanan v. Smith, 43 Miss. 90; Weathersby v. Sinclair, Id. 189.

unquestionably would be to give to a mortgagee the value of the lot clear of the encumbrance of the building, and to the lienholder the enhanced value which his labor and materials have given to the lot. The mortgagee cannot in equity claim that he shall be benefited by the work and labor of the mechanic or material-man, but has a strong claim in justice and equity that he shall not be injured by the operation of their claims. On the other hand, the material-man has a right to insist that the loss incurred by the mortgagee by a forced sale, or by a depreciation in the value of property at the time of sale, shall not be thrown upon him. Each claimant should bear his proportionate share of loss resulting from a sale below the real value of the property. That is a loss to which every mortgagee is exposed, and which is in no wise affected by the building. It is a loss in which both parties necessarily share, in proportion to the amount of their respective claims. This result it is desirable to reach at all times, although in several cases erroneous methods of attaining it have been adopted. Thus, in one,<sup>1</sup> a chancellor thought it would be just for a master to ascertain the original cost of the improvements by means of the bill of particulars furnished with the records of the liens, and then make a proper deduction for depreciation to the time of sale. Now, it is obvious that, although a reference to the actual cost of the labor and materials may be used as an aid in estimating the value, it can rarely serve as a standard by which to ascertain the real addition which the building has made to the market value of the property. The building may be so injudiciously located, or defectively constructed, or so unfit for the purposes for which it was designed, as to add comparatively but little to the real value of the land or to the price which it will command in the market. The real value of a building may bear no relation to its actual cost. To adopt this estimate of value necessarily subjects the mortgagee to the hazards of all the consequences resulting from the want of judgment of the owner and the ignorance and dishonesty of the mechanics and material-men. The only safe mode of determining the relative claims of the respective parties will be for the master to ascertain the fair market value of the lot and building, and also the value of the lot as it stood at the time of the mortgage clear of the building, both valuations having relation, as near as may be, to the time of sale.<sup>2</sup> The policy of this law rests upon the idea of recompensing the mechanic or

<sup>1</sup> *Whitenack v. Noe*, 3 Stockt. (N. J.) 330.

<sup>2</sup> *Whitehead v. First Met. P. Church of Newark*, 2 McCart. Ch. (N. J.) 135.

material-man for the value of the work done or materials furnished in the construction of the building, whose value he has contributed to increase. In the French law, the architects, masons, and others employed in building are privileged creditors only to the amount of the increased value resulting from the work they have done.<sup>1</sup>

§ 264. **Rule of Apportionment between Land and Buildings.**— In another State, under a statute providing that "a previous encumbrancer shall be preferred to the extent of the value of the land at the time of making the contract, and not upon the building erected or materials furnished, until the lien in favor of the lienor shall have been satisfied," the court, it was held, should ascertain, by reference or otherwise, the value of these improvements as compared with the whole value of the premises, and give to the lienors their due proportion of the proceeds;<sup>2</sup> and if there be a surplus of either fund, it might be applied to the satisfaction of the other lien.<sup>3</sup> A more definite statement of the rights of each is, that neither prior nor subsequent encumbrances can operate upon the buildings erected or materials furnished, to the prejudice of the persons performing the labor or furnishing the materials; a prior encumbrancer should be preferred to the extent of the value of the land at the time of making the contract for the erection of the building, and he also has a subsequent lien on the building, subject to the first lien of the mechanic; and the mechanic, in like manner, has a prior lien on the building, and a subsequent lien on the land. Each may have his debt satisfied out of the fund upon which he has a first lien; and if that should be insufficient, then he can resort to the residue out of any surplus of the other fund which might remain after satisfying the prior lien thereon.<sup>4</sup> So that, in a proceeding to enforce a mechanics' lien, to which a prior mortgagee was a party defendant, where the court found the proportion of the value of the premises at the time of the decree, which was added thereto by reason of the improvements, out of which the mechanics' lien arose, and then directed that, out of the proceeds of a sale of the premises, the proportion thereof, so ascertained, which would arise from the land without the improvements, should be first applied on the mortgage, and the proportion arising from the enhanced value on account of the improvements should be paid on the mechanics' lien; and

<sup>1</sup> *Morris Co. Bank v. Rockaway*, 16 N. J. Eq. 150; *Code Napoléon*, art. 2103.

<sup>2</sup> *Raymond v. Ewing*, 26 Ill. 329.

<sup>3</sup> *Smith v. Moore*, Id. 392.

<sup>4</sup> *North Presbyterian Church of Chicago v. Jevne*, 32 Ill. 214.

any surplus of the latter fund to be applied to satisfy any balance due on the mortgage, — it was held, as between the mortgagee and the mechanics, the decree was correct.<sup>1</sup> Where the property is encumbered by a prior mortgage, the decree may direct a sale of the premises in fee, notwithstanding the mortgage may not then be due; and it is not error for the court to decree a sale of the property, and then direct the master to take evidence, and report to the court the comparative value of the land and improvements at the time of the sale, such value being determined in reference to the day of sale. Evidence after the sale would be more satisfactory.<sup>2</sup> But when an entire sale has been made of the whole property, and some of the debts secured are not then due, in ascertaining the proper amount to be paid upon such debts, there will be a rebate of interest from the date of the judgment to the maturity of the debt.<sup>3</sup>

§ 265. *Rents, etc.* — So, under a law which provided that “in all cases, when any contract shall be made between any proprietor or lessor of any tract of land . . . and any other person, for the erection,” etc., the latter “shall have a lien to secure the payment of the same upon the buildings and materials aforesaid; and said buildings and materials shall not be subject to any other lien whatsoever, until the aforesaid lien shall be cancelled.” If a prior mortgagee on the land file a bill to foreclose, and a receiver be appointed, the mechanic will be entitled to have so much of the rents accruing from the building before the receiver took possession as the said receiver may have collected from the prior occupant.<sup>4</sup> Apportionment has also been made where the holders of liens on machinery and fixtures and on the building are different parties, and rent has been received for the use of the whole property, by trustees, before the sale under a decree. In distributing such rent, there should be given to the holders of the lien on the machinery such proportion as, according to proof, they would be entitled to in view of the greater wear and tear of the machinery.<sup>5</sup> Another instance of equitable interference in aid of the mechanics’ lien is where the law gives a party a lien not on the land, but on the buildings erected which are sold. The purchaser, if no remedy be specially provided, may apply to a court of equity, as no other court, from the peculiar nature of the case, is competent to give adequate relief, without

<sup>1</sup> *Howett v. Selby*, 54 Ill. 151; *Dingle-dine v. Hershman*, 53 Ill. 280.

<sup>2</sup> *Croskey v. N. W. Man. Co.*, 48 Ill. 481.

<sup>3</sup> *North Presbyterian Church of Chicago v. Jevne*, 32 Ill. 214.

<sup>4</sup> *Hoover v. Wheeler*, 23 Miss. 314.

<sup>5</sup> *McKim v. Mason*, 3 Md. Ch. 186.

injustice to the respective rights of the parties. It is proper that this court should in such cases direct how the purchasers' right to remove the buildings and materials should be exercised, so as to do no prejudice to the rights of the owners of the ground, when this could not be done by the court authorized to adjudicate the lien.<sup>1</sup> In these cases of conflicting and separate liens upon buildings and lands, where it is necessary to ascertain the value of certain parts of the property, a commissioner may be appointed for that purpose, and report to the court;<sup>2</sup> or the court should, by a jury or master, ascertain the separate value of the land and of the building.<sup>3</sup>

<sup>1</sup> *Otley v. Haviland*, 36 Miss. 19.

<sup>3</sup> *North Presbyterian Church of Chi-*

<sup>2</sup> *Werth v. Werth*, 2 Rawle (Penn.), *cago v. Jevne*, 32 Ill. 213.



## CHAPTER XXIII.

## CONTINUANCE OF LIEN.

§ 266. **Continuance dependent on Statute.**—The continuance of the mechanics' lien, like its creation, depends entirely upon statutory provisions. When once brought into existence, without limit as to duration, there is no principle which operates to destroy it, except such as is provided for in the statute, or is adopted in analogy to its provisions.<sup>1</sup> Above all liens, it should be the reward of the diligent; and it will accordingly be found that every State has imposed certain conditions upon its continuance. Some have limited it for a period certain; others have made it dependent upon a vigilant prosecution; while others still have assimilated the judgment on the lien, as regards continuance and revival, to that of a judgment in personal actions. Thus, where a mechanics' lien law provided that the lien should take effect from the filing of the notice, "and shall continue in force for the space of one year thereafter," it expires absolutely at the expiration of that period. And although in some cases the owner should be able to delay the proceedings until the expiration, the courts, without special statutory power, cannot extend or prolong it.<sup>2</sup> It has been expressly held that where a lien expires in five years unless judgment is obtained, the fact that certain delay was occasioned by the owner, obtaining continuances, will not prevent it from expiring.<sup>3</sup> The answer is, the statute has not provided in these cases an effectual remedy. It is not continued, even though a judgment is obtained against the owner of the property within the year, unless the legislature has so provided.<sup>4</sup> So where, under the same law, a judgment was recovered, execution issued, and sale made, all within the year from the filing of the notice, a party purchasing at this sale has the better title than another who buys under a judgment obtained in proceedings under the same law, though prior in

<sup>1</sup> *Eschbach v. Pitts*, 6 Md. 71; *Knorr v. Elliot*, 5 Serg. & R. 49.

<sup>2</sup> *Poerschke v. Kedenburg*, 6 Abb. Pr. N. S. 172.

<sup>3</sup> *Hunter v. Lanning*, 76 Penn. 25.

<sup>4</sup> *Freeman v. Cram*, 3 N. Y. 305.

date, if the judgment were not recovered within the year from the filing of the notice; because this last judgment, not having been obtained within the year, was not a continuance of the lien, and dated as to priority only from the time it was rendered.<sup>1</sup> A provision that a lien commenced in due time shall continue until a judgment is rendered, and a year after, means a final judgment, not one that is reversed on appeal and a new trial granted.<sup>2</sup>

§ 267. **When Continuance rests in Discretion of Court.** — Such statutes, however, offered a premium to the owner to resort to every stratagem to delay the consummation of proceedings, and have not been generally followed in more recent enactments. These latter have usually reposed a discretion of continuance of lien in the courts; as, that “liens shall in all cases cease after one year, unless by order of court the lien is continued and a new docket made stating such fact (without a discharge of the lien).” Under such a statute the lien ceases and is at an end after one year from the creation, unless continued, by order of the court, before the year expires; and that by its own limitation, and without further order.<sup>3</sup> And wherever a lien may be continued within a specified period, by a court, and the time elapses without an order continuing it, it would be inoperative if made afterwards.<sup>4</sup> So if, under the above statute, the order continuing the lien, although obtained before the expiration of the year, was never left or filed with the clerk, it is nevertheless extinguished; because the act of making a new docket by the clerk is an essential prerequisite to the continuation of the lien. It may be proper, where a party has done all that lies in his power, by procuring the necessary order from the court, and filing the same with the county clerk within the time limited by law, and that official has either lost or mislaid the same, or through inadvertence or mistake omits to make a new docket, that the court should in its discretion afford relief, provided the rights of *bona fide* purchasers do not intervene, by ordering the docket to be made *nunc pro tunc*. But where the lienor did not himself do all in his power, in either filing or leaving the order, the lien is not continued, and he must suffer for his own laches.<sup>5</sup> Where this discretion rests with the court, and a lienor has in good faith begun proceedings to enforce his lien, an order ought

<sup>1</sup> *People v. Lamb*, 3 Lans. (N. Y.) 134.

<sup>2</sup> [*Haag v. Hillemeier*, 41 Hun, 390.]

<sup>3</sup> *Matthews v. Daley*, 7 Abb. Pr. N. S. (N. Y.) 379.

<sup>4</sup> *Stone v. Smith*, 3 Daly (N. Y.), 213.

<sup>5</sup> *Barton v. Herman*, 8 Abb. Pr. N. S. (N. Y.) 399.

always, unless under very special circumstances, to be granted, to continue such lien, and the lienor not prejudiced by the lapse of the statutory limitation before sale can be made. Such an order would be granted either on motion with notice or *ex parte*.<sup>1</sup> But, where a provision declaring that liens shall "in all cases" cease at the expiration of one year, unless continued by order of court, refers to the lien on the premises, it has no reference to a claim by the lienor for surplus moneys arising on sale of the land upon judgment in foreclosure, which cuts off the lien; as, in such case, the claim of the lienor is reduced to a right to the avails.<sup>2</sup> A lien continued by order of court lasts until the order is vacated or the lien is disposed of as provided in the statute.<sup>3</sup>

§ 268. **Dependent on Compliance with Statutory Requirements.**—Illustrative of the proposition that the continuance of the lien depends upon a strict compliance with the provisions of the law may be mentioned a statute which provides "that no debt for work and materials shall remain a lien on the building longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted or the claim filed within six months after performing the work." Here a party claiming a lien, and who did not pursue the course pointed out, by filing any claim or commencing any suit within the six months, has no lien, although he had instituted suit and obtained judgment within the two years from the commencement of the building. The lien creditor might have made his lien perpetual by pursuing the directions of the act; but as he neglected to do so, and, instead, adopted the common-law remedy, there is no reason why he should have any other rights than those secured thereby. And in a contest between rival creditors, his lien will only date from the day of his judgment, and not relate to the commencement of the building, as it would had he pursued the provisions of the lien law.<sup>4</sup> So, where under the same law, if the claim be filed, but after the six months from the time the work is finished, the lien is not kept alive, although the claimant has taken out a *scire facias* to enforce the lien, and recovered judgment within the two years from the commencement of the building, as it had not the foundation notice provided for in the statute.<sup>5</sup> Again, when the recording of a

<sup>1</sup> Welch v. Mayor of New York, 19 Abb. Pr. (N. Y.) 132.

<sup>2</sup> Emigrant In. S. Bk. v. Goldman, 75 N. Y. 127.

<sup>3</sup> [Bigelow v. Bailey, 59 Hun, 403.]

<sup>4</sup> Cornelius v. Uhler, 2 Browne (Penn.),

<sup>5</sup> Hern v. Hopkins, 13 Serg. & R. 269.

builder's contract within a prescribed time is made obligatory in order to preserve the lien against third persons for work and labor done and materials furnished, if it be omitted, it is fatal.<sup>1</sup> But the failure of a clerk to record the lien does not affect its validity, under a law that "it shall be the duty of the clerk to make an abstract of all liens in his office, in a book to be kept by him for that purpose."<sup>2</sup> The statute is remedial, and is to be liberally construed for the advancement of the remedy, and the neglect of the clerk to enter an abstract of particulars in the mechanics' lien book will not prejudice an innocent materialman who has personally done all the law required of him.<sup>3</sup>

§ 269. *Lis Pendens*.—Notwithstanding a party has filed his claim or instituted his suit within the statutory period, he must also exhibit reasonable diligence in its prosecution. [For where suit must be brought within a certain time, which is done, the existence of the lien after the time for bringing it has expired depends exclusively upon the pendency of the suit brought for its enforcement. If that suit should be dismissed for want of prosecution, or for any other cause, the lien would be as effectually lost and defeated as it would have been if no suit had been brought within the time allowed by law. It is evident, therefore, that the lien is alone continued in force by the *lis pendens*, and the inquiry naturally arises, how long can it be thus sustained and kept in existence so as to affect prejudicially the rights of third persons. The general rule is that a party who claims the benefit arising from a *lis pendens* must, in order to entitle himself to it against a *bona fide* purchaser, show that the suit has been prosecuted with reasonable diligence. This principle has been adopted to guard in some degree against the mischiefs that might arise to the rights of third persons, from permitting a lien on property, latent in its character, to be continued beyond a period of time actually necessary for its enforcement. There is no good reason why the same doctrine should not apply to cases of mechanics' liens. The same evils will result from the continuation of the lien, by reason of the *lis pendens*, beyond a reasonable time. The legislature could not have intended to create a lien that might be continued in existence indefinitely by the mere pendency of a suit for its enforcement. And where a suit must be instituted within a certain time, this intention is unmistakably manifested. To allow, therefore, a period of four years to elapse after the cause is

<sup>1</sup> Kohn v. McHatton, 20 La. An. 485.

<sup>2</sup> Cornelius v. Grant, 8 Mo. 59.

<sup>3</sup> [Anderson v. Seamans, 49 Ark. 475.]

ready for hearing, is such gross negligence as discharges the lien as to third persons without actual notice.<sup>1</sup> But a reasonable excuse for the delay complained of is always available to keep up the *lis pendens*.<sup>2</sup>

§ 270. **Effect of Lis Pendens.** — The effect of a *lis pendens*, as regards proceedings *in rem*, or where the title to the property purchased *pendente* is in litigation, may be stated to be: first, that the institution of the suit is constructive notice to all purchasers after suit commenced; second, that a purchaser *pendente lite* acquires no title, by his purchase, which he can set up or assert to the prejudice of the rights of the parties litigant; and the suit will be heard and determined upon the merits as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase, which, if valid for any purpose, can only be so as between himself and his vendor, to enable him, upon the determination of the suit, to succeed to the rights of such vendor.<sup>3</sup> To make this doctrine effectual, it applies as well to those who have no actual notice of the suit as to those who buy with full knowledge.<sup>4</sup> In its application to the mechanics' lien laws, it has been held that where the materials furnished create the lien, the filing of the lien claim is in the nature of a bill in chancery, and every purchaser after its filing takes with notice of a *lis pendens*.<sup>5</sup> So when suit is brought within two years, and the lien is preserved until the action is determined, a purchaser pending the action takes subject to the lien.<sup>6</sup> Again, where the enforcement of the lien is a proceeding *in rem*, its commencement, followed up by the *lis pendens*, is the statutory substitute for an actual seizure, and the property, pending the litigation, may be said to be in *quasi custodia legis*.<sup>7</sup> Where the lien, if proceedings are commenced within a certain period, is declared "to continue until judgment," and proceedings were begun within that period, and judgment was rendered for the owner, but was reversed upon appeal, it was held that, notwithstanding the reversal, the lien had not ceased.<sup>8</sup> Where a bill of foreclosure is filed by a mortgagee, it is not within the power of the mortgagor pending the suit, by contract with a mechanic without the consent of the

<sup>1</sup> Erhman v. Kendrick, 1 Met. (Ky.) 146.

<sup>2</sup> Wickliffe v. Breckinridge, 1 Bush (Ky.), 427.

<sup>3</sup> Whiting v. Beebe, 12 Ark. 421.

<sup>4</sup> Wickliffe v. Breckinridge, 1 Bush (Ky.), 427.

<sup>5</sup> Edwards v. Derrickson, 4 Dutch. (N. J.) 45.

<sup>6</sup> Ambrose v. Woodmansee, 27 Ohio, 147.

<sup>7</sup> Poerschke v. Kedenburg, 6 Abb. Pr. n. s. (N. Y.) 172.

<sup>8</sup> Fox v. Kidd, 77 N. Y. 489.

mortgagee, to create an encumbrance upon the property which can in any wise affect the rights of the mortgagee, as they may be declared by final decree.<sup>1</sup> A notice of *lis pendens* must be filed by the lienor within the statute time, although he is defendant in a suit involving the premises.<sup>2</sup>

§ 271. **Revival.**—The necessity of reasonable diligence in prosecution has also been applied by statute and adjudication to the revival of the lien by *scire facias*. Thus, where the issuing of a *scire facias* within five years must, to preserve the lien, be “duly prosecuted,” and it was allowed to remain dormant for eight years and then tried, it did not preserve the lien. It would be an intolerable practice, it was said, to let a lien lie so long, apparently dead and abandoned, and then, after witnesses, books, and papers are scattered, to start it into new life, and enforce it against parties who could not be expected to retain the means of defence.<sup>3</sup> But where a law allows a revival to be made, by issuing a *scire facias* within five years, which is done, the lien does not expire by reason of the lapse of five years between the filing of the lien and the verdict.<sup>4</sup> So, a second *scire facias* may be issued to revive and keep alive the lien of the claim, as a claim merely.<sup>5</sup>

Under another lien law, “that the lien for every debt for which a claim shall be filed, as aforesaid, shall expire at the end of three years from the day on which such claim has been filed, unless the same shall be revived by *scire facias*, in the manner provided by law in other cases of judgments, in which case such lien shall continue for another period of three years, and so from one such period to another, unless satisfied or extinguished,” etc., it was contended that this section interposed an absolute bar to all further proceedings upon the claim after the expiration of the three years, although the *scire facias* had been issued within that time. But this view was not assented to by the court.<sup>6</sup>

<sup>1</sup> *Hards v. Conn. Mut. L. Ins. Co.*, 8 Biss. 234.

<sup>2</sup> [*Danziger v. Simonson*, 53 N. Y. Super. 158.]

<sup>3</sup> *Ward v. Patterson*, 46 Penn. 372.

<sup>4</sup> *Sweeny v. McGittigan*, 20 Penn. 319.

<sup>5</sup> *Ketchum v. Singerly*, 12 Phila. 189.

<sup>6</sup> *Blocher v. Worthington*, 10 Md. 1; [*Maxwell v. Butcher*, 17 Phila. 167.]

## CHAPTER XXIV.

### WAIVER OF LIEN.

§ 272. **Lien may be waived by Express Agreement.**<sup>1</sup>—Ordinarily any privilege conferred by statute may be waived by the express agreement of the party in whose favor the right exists. The right to enforce a mechanics' lien is no exception to this principle. For example, if a contractor agree that he will not encumber a building by any liens, he is forever debarred from filing them contrary to the terms of his contract. And when no sub-contractor or person furnishing labor or materials for the original contractor can acquire any rights against the owner, in contravention of the terms and conditions of the original contract, and the contractor has waived this lien, a sub-contractor having notice cannot claim any right to file a lien. Knowledge by a sub-contractor that there is an agreement in writing between the original contractor and the owner is sufficient to put him upon inquiry as to the contents of the writing, and charge him with notice thereof.<sup>2</sup> Thus, where a railroad entered into a contract which stipulated that the contractor should not underlet any part of the work without the written assent upon the written application of the contractor, a party with whom a sub-contract has been made has no lien; and although the specifications were delivered to the sub-contractor, and directions were given to him, and money paid to him, these do not dispense with the written assent.<sup>3</sup> When by express agreement a contractor in a building operation has waived his right to lien, and has agreed to rely on personal and collateral security without lien, the stipulation will be enforced.<sup>4</sup> Where a mechanic, before commencing work upon a building in course of construction, agreed with the owner that he would look only to the contractor for his pay, he thereby waived any right which the law might otherwise have given him, to a lien upon such building.<sup>5</sup> Again, where a mechanic about

<sup>1</sup> This section was cited with approbation in *McMurray v. Brown*, 91 U. S. 266.

<sup>2</sup> *Bowen v. Aubrey*, 22 Cal. 566.

<sup>3</sup> *Benedict v. Dan. & Nor. R. R.*, 24 Conn. 320.

<sup>4</sup> *Long v. Caffrey*, 1 Luzerne Leg. Reg. Rep. 188.

<sup>5</sup> *Murray v. Earle*, 13 S. C. 87.

to erect a building stipulates in writing with the owner that he will not file a lien, and the owner, to secure the mechanic, stipulates that he will insure the building, these are separate and independent covenants, and the mechanic cannot file a lien because the owner did not insure.<sup>1</sup> But, in order to be a waiver of lien by contract, it should appear by its terms, under a reasonable construction, that it contemplated that under no circumstances should there be a lien. Thus, where a contract stipulated that the contractor "will execute and deliver a release from mechanics' liens, all the said thirty-eight houses as soon as they are *respectively* completed and ready for occupancy," it does not provide that no lien shall exist, but that at a particular period, — that is, on the completion of each separate house, — the lien shall be released, and therefore, if owner failed, and the houses were never completed, the mechanic would have his lien.<sup>2</sup> Where a statute gives a laborer a lien, it is for the party opposing it to show that he has knowingly surrendered or waived such lien.<sup>3</sup> The covenant of a contractor for work and materials to be done and supplied for the erection of a building, that he will not suffer or permit any mechanics' lien or liens to be filed, is a waiver of the right to file or cause to be filed a claim for a lien in his own favor.<sup>4</sup> If the material-man agrees with the contractor not to set up a lien, this bars his suit for foreclosure.<sup>5</sup> A formal waiver of lien unsupported by any consideration is ineffectual.<sup>6</sup> An agreement to waive not reduced to writing as the parties intended will not affect the lien.<sup>7</sup> From the fact that a clerk of a lumber dealer was in the habit of signing his employer's name to releases of the right to file mechanics' liens in cases where bills for lumber furnished were paid, no implication can be drawn of his authority to sign such a release where the money was not paid. The distinction between releasing a mechanics' lien after payment, and releasing without payment, is obvious. In the former case the payment extinguishes the lien and the release amounts to no more than a receipt which a business manager or clerk, authorized to receive the money, might well give on behalf of the employer. But the ordinary duties of even a business manager would not authorize him to execute in his employer's name a release under a seal of a valid lien on real estate; and a release so executed is inad-

<sup>1</sup> Long v. Caffrey, 93 Penn. 526.

<sup>2</sup> McLaughlin v. Reinhart, 54 Md. 77.

<sup>3</sup> McCabe v. McRea, 58 Me. 99.

<sup>4</sup> [Scheid v. Rapp, 121 Pa. 593.]

<sup>5</sup> [Isenman v. Fugate, 36 Mo. App.

166.

<sup>6</sup> [Abbott v. Nash, 35 Minn. 451.]

<sup>7</sup> [Irish v. Pulliam, 32 Neb. 24, 26, 27.]



missible against the employer, without proof that he authorized or subsequently ratified its execution by the employee.<sup>1</sup>

§ 273. **Waiver by Implication and Estoppel.**—There is nothing in the cases hostile to the idea that the lien of the mechanic may also be extinguished by implication arising from the conduct of the parties.<sup>2</sup> But as it is strictly a legal lien, and expressly given by law, it ought not to be considered as waived or released except by plain acts.<sup>3</sup> What constitutes a waiver must be determined from the circumstances of each particular case,<sup>4</sup> it being essentially a question of intention; such intention implying either an actual determination of the lien-holder to surrender the right, or such acts on his part that the public may reasonably suppose he had waived his security of lien, in which latter case he would be estopped from afterwards asserting it. If a party having a lien on land induce a third person to believe that he does not look to the land but to other means for payment, and in consequence thereof the latter purchases it, he will be estopped from setting up his right.<sup>5</sup> A sub-contractor who stands by and without protest sees the owner pay the contractor, cannot afterwards claim a lien.<sup>6</sup> There can be no question that it is well settled in equity and law, that when a party wilfully misrepresents a fact to another, and on the strength of such false representation he is induced to alter his position, the former is precluded from setting up that the representation was not true. Thus where the holder of a mechanics' lien was present at a sale, and stated that there was no incumbrance upon the estate, and advised a party to buy it, who relying on the statement became the purchaser, the former cannot set up his lien, and the latter will be entitled in equity to an injunction to restrain him from enforcing it.<sup>7</sup> Where mechanics made a settlement with an owner and accepted notes which they assigned to third parties, and also a warranty deed of certain real estate in excess of the lien, and for the excess gave in return their notes to the owner, during all of which time the mechanics knew the owner was negotiating for a loan on the buildings and made no objection, it was held that the mechanics by their conduct were estopped from insisting that the lien of the loaner was sub-

<sup>1</sup> [Deacon v. Greenfield, 141 Penn. 467; Corr v. Greenfield, 134 Penn. 503.]

<sup>2</sup> Gorman v. Sagner, 22 Mo. 137.

<sup>3</sup> Hinchman v. Lybrand, 14 Serg. & R. 32.

<sup>4</sup> Mims v. Macon, 3 Ga. 333; Grant v. Strong, 18 Wall. (U. S.) 623.

<sup>5</sup> Scott v. Orbison, 21 Ark. 202.

<sup>6</sup> [Vreeland v. Ellsworth, 71 Iowa, 347.]

<sup>7</sup> Hinchley v. Greany, 118 Mass. 595.

ordinate to their lien.<sup>1</sup> So, if judgment creditors assent to a deed of trust made by their debtors, assigning real and personal property for their payment, according to their legal priorities, and by their conduct induce third parties to purchase such estate then bound by their judgments, and to believe that they will look to the trustees, and not to their liens, for payment of their claims, such conduct will furnish the purchasers a valid, equitable defence against the enforcement of the judgment liens by a resale under execution.<sup>2</sup> A mechanic, also, who unites in a conveyance of premises subject to his lien to a purchaser waives his right thereto.<sup>3</sup> An agreement never to enforce a lien releases the same; but if for a specified time only, it will not.<sup>4</sup> A party going security for a contractor that no liens shall accrue against a building cannot himself file a lien for materials furnished the contractor. But if the surety was discharged of his obligation, his right would revive.<sup>5</sup> So where a party has a right of lien on a fund, and accepts an order to pay the money or a portion to some one else, it is a waiver of his lien *pro tanto* in favor of the acceptance.<sup>6</sup> An agreement by P. to give the owner a good lien bond "as a bar against liens on the house" is a waiver by P. of his lien, and it is not impaired by the fact that the owner violates his part of the contract stipulations.<sup>7</sup> If a sub-contractor stands by and consents to the owner's payment to the original contractor of all that was owing by him, such sub-contractor cannot afterward complain and subject the owner's property to a lien.<sup>8</sup> A material-man who directs the owner to pay the contractor money withheld from the latter for the material-man's protection, waives his lien to the extent of such payment.<sup>9</sup> One who joins in a bond with the paramount contractor that no mechanics' lien shall be filed against the building, and subsequently becomes a sub-contractor, cannot himself file a lien for his work done.<sup>10</sup> So in a Missouri case it was said that a surety on the contractor's bond cannot as a sub-contractor pursue a lien the bond was intended to prevent.<sup>11</sup> If labor or material be furnished upon an understanding or agreement, either expressed or implied, that no lien will be asserted, then the right to assert

<sup>1</sup> McGraw v. Bayard, 96 Ill. 147.

<sup>2</sup> Doub v. Barnes, 4 Gill (Md.), 1.

<sup>3</sup> Alexander v. Slavens, 7 B. Mon. (Ky.) 356.

<sup>4</sup> Chambers v. McDowell, 4 Ga. 185.

<sup>5</sup> Trustees Ger. Luth. Ch. v. Heise, 44 Md. 455.

<sup>6</sup> Tiernan v. Jackson, 5 Pet. (U. S.) 580.

<sup>7</sup> [Pinning Bros. v. Skipper, 71 Md. 347.]

<sup>8</sup> [Chilton v. Lindsay, 38 Mo. App. 58.]

<sup>9</sup> [Rand v. Grubbs, 26 Mo. App. 591.]

<sup>10</sup> [Given v. Church, 15 Phila. 300.]

<sup>11</sup> [Skrainka v. Rohan, 18 Mo. App. 340, 342. But compare Hayden v. Wulff, 19 Mo. App. 353.]

it is waived, and cannot be enforced against a subsequent purchaser or lienor. The understanding between these parties as evidenced by a long continued usage and mode of dealing between them, namely, to open and run mutual accounts between them in relation to their respective lines of business, and at the end of every six months to adjust the balance and execute a note for the same payable in four months, was inconsistent with the right to perfect a mechanics' lien for labor or materials furnished, there being no showing of any contract other than such as may be implied from their mode of dealing with each other.<sup>1</sup> A mechanic furnishing material for the construction of a mill under a contract with the owner, may, by his agreement as to the manner of payment, and his acts with respect to the claims of other creditors, be precluded from asserting a mechanic's lien, as against such creditors, although he has made no express promise that he will not assert such lien. "Klotz & Kromer are, upon the plainest principles of equity, precluded by their acts and agreements with the Steel Company, from asserting such objections to the mortgage. They joined other citizens of Sandusky in accepting the proposition of the Steel Company to build the rolling-mill; they subscribed and paid for bonds issued by the company and secured by the mortgage, and thereby induced others to do the same thing; they are beneficiaries under the mortgage; they received from the Steel Company, in payment of more than two-thirds of their claim, the sum of \$57,000, which they knew had been advanced to the Steel Company on the faith that this was a valid mortgage; they sold to others the larger portion of the bonds they received from the company, and it is fair to say that their purchasers relied on the mortgage as a security. Under such circumstances, there can be no justice in saying, that, because they were not fully paid, as they expected to be, out of the moneys so loaned to the Steel Company, they may, on discovering that the company and its guarantors have failed, assert a mechanics' lien for the balance of their debt, and thereby defeat the mortgage."<sup>2</sup> In case of a common-law lien on personalty, it is held that a demand by the debtor for security after the time he says his lien attached is inconsistent with such lien.<sup>3</sup> A party put up certain lines of wire on telegraph poles under a contract, failure being made in payment he perfected his claim for lien under the mechanics'

<sup>1</sup> [Iron Co. v. Murray, 38 Ohio St. 323, 327.]

<sup>2</sup> [West v. Klotz, 37 Ohio St. 420, 429, citing Phil. §§ 273, 495.]

<sup>3</sup> [Smith v. Greenop, 60 Mich. 61.]

lien law, it was held that by so doing he waived the right he had, if any, to assert his common-law lien.<sup>1</sup> Where the elements of estoppel do not exist "the question of waiver is one of intention."<sup>2</sup> And the intention to waive must clearly appear.<sup>3</sup> A party will not be held to waive a requirement, unless it appears that he intended to do so, or the circumstances create an estoppel.<sup>4</sup> The taking of other security is not to be deemed a waiver when not so intended, and not necessarily inconsistent with the intention that the lien shall remain.<sup>5</sup>

§ 273 *a*. **Instances of no Estoppel.** — Where a sub-contractor was present at a settlement between the owner and contractor, as to the sum due for the erection of a house and for extra work, at which time the owner accepted an order of the contractor for the balance due in favor of a third person, but the former did not say or do anything that could have led the owner to believe he was paid or had released him, it was held that he was not estopped from enforcing his lien against the owner, from the mere fact of his being present at the settlement.<sup>6</sup> A sub-contractor is not estopped by reason of the fact that the owner was induced to employ a certain contractor on his representation that he was responsible, and that he would be responsible that the contractor would so perform his contract that no liens would be filed, such agreement being void, not being, under the statute, in writing, and there being nothing in it that operated by way of estoppel.<sup>7</sup> Where a sub-contractor had a lien against the owner, the latter answered that the sub-contractor assisted the contractor to dispose of his property, subject to execution, well knowing that, prior to the recording of the notice of lien, the defendant had paid the contractor in full. It was held on demurrer that the plaintiff's right to a lien was statutory, and the answer insufficient.<sup>8</sup> A. advanced money to B. to enable B. to improve certain land, taking a deed of trust on the land, and a bond from C. the contractor, with D. as surety, that the buildings to be erected should be delivered to B. free from mechanics' liens. D. subsequently filed a lien for materials delivered to C. for the builders. It was held, that D. was not estopped by the bond from filing his lien, that if A. lost any part of his money

<sup>1</sup> [Vane v. Newcombe, 132 U. S. R. 220.]

<sup>2</sup> [Howe v. Kindred, 42 Minn. 433, 436, citing Phil. § 272.]

<sup>3</sup> [Lee v. Hassett, 39 Mo. App. 67.]

<sup>4</sup> [Floyd v. Rathledge, 41 Ill. App. 370.]

<sup>5</sup> [McKeen v. Haseltine, 46 Minn. 426.]

<sup>6</sup> Havighorst v. Lindberg, 67 Ill. 463.

<sup>7</sup> Abham v. Boyd, 7 Daly (N. Y.), 30.

<sup>8</sup> Andis v. Davis, 63 Ind. 17; Merritt v. Pearson, 58 Ind. 386.

by reason of such lien being filed, the damage so sustained might be set up as a counter-claim. It seems, also, that if D. was about to enforce a lien which endangered A.'s debt, A. might enjoin its collection till his debt was paid.<sup>1</sup> A mechanic who has a prior lien does not lose it by being made a party defendant to a foreclosure suit of mortgage, where the bill did not ask to ascertain the amount of his claim or have it paid out of the proceeds, and no such provision was contained in the judgment; that the lien was not affected by the judgment; and an appearance by the lienor and waiver of service of papers, "except notice of sale and application for surplus moneys," was not a consent to come in subsequent to the mortgage, nor did it operate as an estoppel against any claim upon the premises by virtue of the lien, in the absence of proof that the premises were, with his knowledge and acquiescence, sold clear of the lien.<sup>2</sup> A contractor is not estopped to claim a lien merely because he gave the owner a bond of indemnity against liens, but the owner may set up as a counter-claim the damage he has suffered against which the plaintiff agreed to indemnify him.<sup>3</sup> Where the contractor D. assigned to A. \$6,000 of the funds to be due on the contract, and afterward assigned to T. (who had furnished labor and materials) another \$5,000 of said funds, it was held that the assignment was in effect of moneys due to Duffy after the discharge of all mechanics' liens, such as would have been due to Duffy except for the liens; Duffy could not assign more than this. That T.'s lien right was superior to his right acquired by the assignment and the acceptance of the assignment cannot be assumed to have been a waiver of his lien. A lienor's right will not be considered waived unless the facts clearly indicate an intention to abandon them, and such an intention cannot be presumed from his acceptance of an assignment under the facts in this case, for it does not appear that the assignment was accepted as a payment of the indebtedness, and unless it was so accepted, the debt remains, and the right of lien continues to exist as incidental thereto.<sup>4</sup> Retention of title by a seller of machinery placed on land until the price is paid, with a reservation of the right, in case of default in payment, to take possession of and remove such machinery without process, is not a waiver of the lien given by law on any lot of ground for the price of machinery furnished or erected thereon.<sup>5</sup> An Illinois

<sup>1</sup> Hartman v. Benny, 56 Mo. 487.

<sup>2</sup> Emigrant Ind. S. Bk. v. Goldman,  
75 N. Y. 127.

<sup>3</sup> [Deitz v. Leete, 28 Mo. App. 540.]

<sup>4</sup> [Moran v. Murray Hill Bank, 58  
N. Y. Super. 199.]

<sup>5</sup> [Case Mfg Co. v. Smith, 40 Fed. R.  
339.]

statute (R. S., chap. 82, sec. 51) provided "that all persons who may have furnished, etc., to any railroad, etc., anything necessary for the construction, etc., of such road, etc., shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same shall have a lien upon all the property, etc., of said railroad corporation; as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of said work or labor," etc. While the above act was in force a rolling-mill furnished rails to a railroad, under a contract which stipulated that, until fully paid for, the rolling-mill should have a lien on the rails, and the possession thereof by the railroad should be the possession of the rolling-mill; it was contended that the latter waived its statutory lien on the railroad by this contract, but the court held otherwise, on the ground that this stipulation did not show any purpose to waive the statutory lien, the railroad at the time of the contract being in contemplation only, and was designed to require the rails to be used in the construction of the railroad where they would be subject to the statutory lien.<sup>1</sup> If, however, the parties make an express contract inconsistent with the statute lien's necessary proceedings, and expressly agree for a specified lien, it will be presumed that the parties intended to substitute this for the statute lien.<sup>2</sup>

§ 274. **Acceptance of Bond with Warrant of Attorney no Waiver.** — In the absence of expressed intention, certain acts having usually been found in point of experience to indicate and accompany an actual intention of waiver, it has been, on the strength of this presumption, adopted as a general rule that the acceptance of a higher security than the creditor had before is an extinguishment of the first debt; thus if a creditor by simple contract accept an obligation, this is an extinguishment of the simple-contract debt; but the acceptance of a security of an inferior nature, or of a security of equal degree, does not extinguish the first debt, — as, in the one case, if a bond be given in satisfaction of a judgment, and, in the other, where an obligee has a second bond given to him for the first debt. A judgment is a security of a higher nature than a bond; and if a bond creditor obtain a judgment on the bond, he cannot afterwards bring an action on the bond. In every instance where the law works an extinguishment, the creditor has gained a higher security; the thing substituted is more beneficial to the creditor

<sup>1</sup> [Chicago & Alt. R. R. Co. v. Union Rolling Mill Co., 109 U. S. R. 702.]

<sup>2</sup> [Howard v. Industrial School, 78 Me. 227, 230.]

than the thing originally contracted for. Now, the debts of the mechanic or material-man were originally simple-contract debts, but, for the security of these debts, the act has created a lien on the building so that the security which the creditors have in relation to the safety of the debts ranks with that of a judgment or mortgage. Therefore the acceptance of a bond and warrant of attorney, and the entering judgment on the bond, is not a waiver or extinguishment of a mechanics' lien.<sup>1</sup> So, whenever the scope of the mechanics' lien is only a collateral security, the claimant having also a concurrent remedy by personal action, the taking of a bond with warrant of attorney to confess judgment, and judgment is confessed thereon, does not extinguish the lien.<sup>2</sup>

§ 275. **General Rule as to Waiver by Acceptance of Promissory Note.** — There is considerable diversity among the decisions of the several States as to how far the mere acceptance by the mechanic of a promissory note from the owner is an extinguishment of his lien. By the general rule of law, the taking a negotiable promissory note or draft of the debtor, on account of a pre-existing debt, is not payment or discharge of such indebtedness.<sup>3</sup> If the instrument taken be payable on demand, it does not affect the original debt, the party being at liberty to sue at any time therefor, and is only required to deliver up the note before judgment. If payable at a future day, the right to sue for the original debt is suspended until the maturity of the note. It operates only as an agreement not to sue until default be made in its payment. The taking of the instrument on account of the debt operates as conditional payment, and the understanding of the parties is deemed to be, that, if paid, it shall discharge the original debt, and not otherwise. This is the result in the absence of any agreement of the parties to the contrary. If so agreed by them, it may and will operate as absolute payment, and the original debt will thereby be absolutely discharged; and this, although a statute provides that the taking of a promissory note, etc., shall not be deemed to waive the right to prosecute the lien.<sup>4</sup> But clear proof of the intent of the parties to that effect will be necessary, in such case, to make the paper final payment of the contract, so as to discharge the lien against the property of the promisor. These propositions have been established by a series

<sup>1</sup> The case of *John Thompson*, 2 *Browne* (Penn.), 297; *Schanck v. Arrow-smith*, 1 Stockt. (N. J.) 314.

<sup>2</sup> *Crean v. McFee*, 2 *Miles* (Penn.), 214.

<sup>3</sup> *Grant v. Strong*, 18 *Wall.* (U. S.) 623.

<sup>4</sup> *McCoy v. Quick*, 30 *Wis.* 521.

of decisions, almost unbroken in England from the days of Lord Holt. The same presumptions prevail in the great commercial States of New York, Pennsylvania, and the West, and generally throughout the country. But in Massachusetts, Maine, Vermont, and Indiana, it has been held that the taking of a negotiable instrument on account of a pre-existing debt is *prima facie* evidence of a discharge of that debt. It, however, is not conclusive evidence, and the presumption arising from that fact is open to be rebutted by other evidence. Upon questions of commercial law, it is of great importance that the process of universal assimilation should be carried as far as possible.<sup>1</sup> An agreement to receive notes in payment waives the lien.<sup>2</sup> The question whether a note is taken as payment, and discharges the lien, is for the jury.<sup>3</sup> Where the owner of a saw-mill, S., contracts with L., the owner of logs, to saw them, and upon L.'s selling the lumber, S. piles it apart, marks it with the vendee's name, and takes L.'s note for the saw-mill, S. waives his lien on said lumber.<sup>4</sup>

§ 276. **When Acceptance of Note is no Waiver.**<sup>5</sup> — In those States where the common-law rule prevails, a note, unless it is taken in payment absolutely, will not discharge a mechanics' lien. It serves but to liquidate the demand, and leaves the party to seek his satisfaction upon the original contract. The law is the same in case of lien as in any other. For, where a note has been taken, an action may afterwards be brought on the original consideration, and the note be used merely to show the amount at which the debt has been liquidated.<sup>6</sup> In a late Illinois case the court said that a mechanic or material-man does not waive his lien by taking a note from the owner for the debt, — this merely liquidates the demand.<sup>7</sup> Again, the mere giving of a note for material furnished for a building, does not destroy the lien which the person furnishing the materials would have had, had the note not been given. So long as the note remains in the hands of the person furnishing the articles, it is a mere adjustment of the amount due, and a written instead of a verbal promise to pay it.<sup>8</sup> In another case, a promissory note given by

<sup>1</sup> Sweet v. James, 2 R. I. 270; Wheeler v. Schroeder, 4 R. I. 383; Chapin v. Persse, 30 Conn. 461; Hopkins v. Forrester, 39 Conn. 351; Hill v. Sloan, 59 Ind. 182; Schneider v. Kolthoff, Id. 568.

<sup>2</sup> [Ellenwood v. Burgess, 144 Mass. 534, 539.]

<sup>3</sup> [Craddock v. Dwight, 85 Mich. 587.]

<sup>4</sup> [Tyler v. Lumber Co., 78 Mich. 81, 85.]

<sup>5</sup> This section was cited with approbation in Pope v. Graham, 44 Tex. 199.

<sup>6</sup> Van Court v. Bushnell, 21 Ill. 624; Brady v. Anderson, 24 Ill. 110; Logan v. Attix, 7 Iowa, 77; Laviolette v. Redding, 4 B. Mon. (Ky.) 81.

<sup>7</sup> [Paddock v. Stout, 121 Ill. 572.]

<sup>8</sup> Milwain v. Sanford, 3 Minn. 149.



sub-contractors to the material-man for the price of the materials is evidence of the price of the materials procured, and does not of itself bar a recovery against the building.<sup>1</sup> Another court regarded the taking of a promissory note as an additional security, and cumulative, and not waiving any statutory lien.<sup>2</sup> The same was held in Iowa,<sup>3</sup> in Texas,<sup>4</sup> and in Kentucky; in which latter State it was said: The taking of the note has no other effect upon the lien than to suspend its enforcement until the credit given in the note has expired. It is but the personal obligation of the debtor, evidenced in a form more convenient and useful to the creditor than the original simple contract.<sup>5</sup> A bill of exchange or other negotiable instrument is governed by the same rules, and does not destroy the lien, unless expressly received as payment.<sup>6</sup> A renewal of the instrument will have no other effect than the original. As where the payee of a note surrenders it to the maker, taking his note for the amount due at a future day, it is a renewal of the note and a continuation of the same debt, and does not effect an extinguishment of the lien pertaining to that debt.<sup>7</sup> So, if the lien be declared to "be in the nature of a mortgage," the renewal of a note secured by mortgage is no discharge of the mortgage.<sup>8</sup> So, taking notes from a lessee for the amount due a mechanic, on which judgment was recovered, did not relieve the lien.<sup>9</sup> Bringing a personal action and obtaining judgment thereon do not bar a mechanic or material-man from filing a lien for the same subject-matter, issuing a *scire facias* thereon, and pressing the same to judgment and execution.<sup>10</sup> Taking a note during or after the work, from one who at the start bound himself personally, is not taking collateral security.<sup>11</sup> Where the security is not of a higher order than that already resting on the premises, nor taken from a third party with circumstances of equitable estoppel, it is presumed that the claimant did not intend to waive his lien.<sup>12</sup> Taking notes due within the time limited for lien suit does not waive the lien.<sup>13</sup> A lien is not waived by taking a note, unless it be taken in payment, or the time of payment of the claim

<sup>1</sup> Odd Fellows' Hall v. Masser, 24 Penn. 507.

<sup>2</sup> Butts v. Cuthbertson, 6 Ga. 166.

<sup>3</sup> Greene v. Ely, 2 Greene (Iowa), 508.

<sup>4</sup> Pope v. Graham, 44 Tex. 196.

<sup>5</sup> Graham v. Holt, 4 B. Mon. (Ky.) 61; Laviolette v. Redding, Id. 81; Finch v. Redding, Id. 87.

<sup>6</sup> Carter v. Townsend, 1 Cliff. 1.

<sup>7</sup> Muir v. Cross, 10 B. Mon. (Ky.) 277.

<sup>8</sup> Montandon v. Deas, 14 Ala. N. S. 33.

<sup>9</sup> Fisher v. Rush, 71 Penn. 40.

<sup>10</sup> Powell v. M'fg Co., 1 Luzerne Leg. Reg. Rep. 92.

<sup>11</sup> [Bissell v. Lewis, 56 Iowa, 231, 236, 239; see § 284.]

<sup>12</sup> [Howe v. Kindred, 42 Minn. 433, 436, 437.]

<sup>13</sup> [Doane v. Clinton, 2 Utah, 417, 421.]

which the lien secures be thereby extended.<sup>1</sup> In Maryland it is expressly provided that the taking of notes or other securities shall not be a waiver of the lien, unless the notes are taken as payment, or the lien is expressly waived.<sup>2</sup>

§ 277. **Note to be produced at Trial, etc.** — One of the principal reasons assigned for the rule adopted in Massachusetts, that, in the absence of any circumstances to indicate a contrary intention of the parties, a bill or note is to be presumed to have been given and received in satisfaction and discharge of a pre-existing debt, is, that if an action may be maintained for the original debt, the debtor may also be sued by an innocent indorsee of the bill or note, and thus be compelled to pay the debt a second time. That difficulty is obviated at common law, and in all the other States, where the common rule prevails, by requiring the bill or note to be produced at the trial, so that it may be cancelled when the judgment is rendered on the original contract;<sup>3</sup> or its absence satisfactorily accounted for.<sup>4</sup> The fact that a party, seeking to enforce a lien, took the note of the person for whom the work was done, for the work, and traded it off, and the note was not produced on the trial, and offered to be surrendered, nor any excuse shown for its non-production, would warrant a judgment for the defendant.<sup>5</sup> The production of the note alone will not in all cases be sufficient. The owner must be secured against all the consequences flowing from his having given his note, before the action will be maintainable by the mechanic. Thus, in a proceeding by a laborer or material-man to enforce a lien, it appeared that the claimant, having received the note of the contractor for the amount of his claim, had indorsed and transferred the note, receiving from the indorsee the amount thereof, and that such indorsee had recovered thereon a judgment against the contractor, which remained unsatisfied and in full force, the claimant could not recover, without proving that he had, by payment to the indorsee or otherwise, become reinvested with the title to the debt. The mere production of the note at the trial, and offering to give it up to be cancelled, was not sufficient. Under such circumstances, the plaintiff must produce evidence which will furnish to the contractor an assurance that payment to the claimant, in satisfaction of the lien, would be protection to him against the

<sup>1</sup> [Calef v. Brinley, 58 N. H. 90.]

<sup>2</sup> [Willison v. Douglas, 66 Maryland, 99.]

<sup>3</sup> Carter v. Townsend, 1 Cliff. 1; Mor-

rison v. The Laura, 40 Mo. 260; Green v. Fox, 7 Allen (Mass.), 85.

<sup>4</sup> St. B. Charlotte v. Lumm, 9 Mo. 63.

<sup>5</sup> Clement v. Newton, 78 Ill. 427.

apparent title of the judgment creditor to collect the same debt by means of the judgment.<sup>1</sup> The note must be produced and surrendered, or its absence satisfactorily accounted for. The policy of the law is to guard the owner against a double liability by reason of its assignment to an innocent holder, especially when the note is commercial paper.<sup>2</sup> Although, in another mechanics' lien suit, the plaintiff declared upon an account for lumber, filing an itemized copy with the petition, but stated that defendant's wife closed the account by a note for the amount, "herewith filed." The note was not filed, and defendant, without answering, filed a motion for an order on plaintiff to file the note; it was held that the note, not being the foundation of the action, need not have been named in it, and the motion was frivolous.<sup>3</sup>

§ 278. **Effect of Negotiation of the Note.**—It has been urged that although the acceptance of negotiable paper is not a waiver of the lien, yet a negotiation of it operates as an extinguishment. This argument has not been generally assented to. On the contrary, it has been almost universally held that the negotiation produces no other effect than to suspend the right of the mechanic to sue, until the instrument is returned to him unpaid, but not the right to file the notice of lien;<sup>4</sup> or, in other words, taking notes for a lien claim, and indorsing them, is no abandonment of the lien security; and if the notes be not paid at maturity, the claimant may enforce his lien in the same manner as if the notes had never been given.<sup>5</sup> In another case it was said that the taking of the debtor's note is not necessarily, and without regard to the intention of the creditor as to the ultimate effect upon the liability of the debtor, a payment of the debt or waiver of the lien. If such is the intention, or if the actual effect of enforcing the lien after the taking the note would be to subject the debtor to a double liability, it is a waiver, otherwise not. The note being taken for the accommodation of the debtor, who is in default and unable to pay, and with the understanding that it is to be negotiated; the act of negotiating the same adds no force to the act of taking it, nor would the further act of proceeding to judgment thereon by the holder. But in either case, the lien creditor, before he can have his decree, must be in con-

<sup>1</sup> *Teaz v. Chrystie*, 2 Abb. Pr. 109; s. c. 2 E. D. Smith, 621.

<sup>2</sup> [*Lane v. Jones*, 79 Ala. 156; *Phillips*, § 277, cited with approval.]

<sup>3</sup> *Hill v. Meyer*, 47 Mo. 585.

<sup>4</sup> *Sweet v. James*, 2 R. I. 270; *Morton v. Austin*, 12 Cush. (Mass.) 389; *Teaz v. Chrystie*, 2 Abb. Pr. (N. Y.) 109.

<sup>5</sup> *Edwards v. Derrickson*, 4 Dutch. (N. J.) 39.

trol of the note or judgment, and offer to surrender or cancel the same.<sup>1</sup> The mere transfer of a promissory note is no waiver of the lien, unless it was taken in payment of the account.<sup>2</sup> The receipt by the lien creditor of the promissory notes of the owner, and passing them away to other parties, does not extinguish the lien.<sup>3</sup> The subject was elaborately considered in a case where the statute expressly declared the taking of additional security to be an extinguishment of the lien: What, it was said, is to be the effect of the assignment of the note for value received by the payee, under his responsibility as assignor, and his regaining the note by refunding the consideration received for it, either before or after it becomes due, but while it is still unpaid by the maker? Surely it would be a perversion of the statute and of the transaction itself to say that this responsibility of the assignor is such security as destroys the lien, or that his payment to his assignee in obedience to that responsibility should have that effect. The responsibility of the assignor does indeed afford to the assignee a security for his reimbursement in addition to that which the obligation of the maker affords, but it is a security that does not come in aid of the obligor himself nor of his indebtedness. The security which will prevent or destroy the lien must be a security which is intended to come in place of the lien and to secure payment for the materials. It is not such security as the creditor himself may furnish, in order to enable him to realize at once, by negotiating the note of his debtor, the price of his materials. It was contended, however, that the statute gives the lien to the mechanics and material-men only, and that it was destroyed by the assignment of the note, for the debt which it was intended to secure. This is not a legitimate conclusion from the premises stated, nor from the additional fact that the statute provides only for the enforcement of the lien by those persons to whom it is given. The question is not to whom the lien belongs, or by whom it may be asserted in case the debt be assigned, but whether it is thereby destroyed. It is immaterial whether it passes wholly to the assignee, so that he may enforce it without even making the original creditor a party, which, however, should not be allowed; or whether a beneficial interest in it passes, to be enforced in the name or with the assent of the original creditor as a party; or whether it remains wholly in the original party, who still continues responsible for

<sup>1</sup> Bayard v. McGraw, 1 Bradw. (Ill.) 134.

<sup>2</sup> Smith v. Johnson, 2 MacArthur (D. C.), 481.

<sup>3</sup> Rush v. Fisher, 8 Phila. 44.

the debt, and is to be enforced only when, by again becoming the holder of the note, he is again the creditor. Were it conceded that, in consequence of the particular mode pointed out for its enforcement, it does not, as other express liens do, pass absolutely to the assignee of the debt, it would be depriving the statute of the beneficial operation it was intended to have, to give it such construction as would prevent the mechanic from using, according to the exigencies of his business, the debt, for the security of which the lien is given, but at the peril of losing the security.<sup>1</sup> But in Iowa it was considered that although the acceptance of a note was not a waiver of the lien, yet if such note should be actually negotiated the lien would be lost.<sup>2</sup> A mere attempt to negotiate it would not have such effect; as where the payee was entitled to a mechanics' lien, and a promissory note had been given in settlement, the mechanic did not waive or forfeit his lien by indorsing it, and leaving it for a time with a third party as collateral or otherwise, unless it appeared that he actually transferred all right to the note.<sup>3</sup>

§ 279. **Acceptance of Note of or Indorsement of Third Person, when a Waiver.** — There is some contrariety of opinion as to how far the acceptance by the mechanic of independent security for the payment of the debt is a waiver by implication of the lien. Some courts regard such security as absolute extinguishment, when unexplained by evidence of the actual intention of the parties, in analogy to the waiver of a vendor's lien under similar circumstances; while others hold these securities to be *prima facie* only collateral, and not in any sense payment. With the former, the taking of other security, either on property or that of individuals not parties to the transaction, will have the effect to discharge premises from the lien.<sup>4</sup> As where the payee or his assignee surrenders the subsisting note, and takes another not executed by the original maker, but payable to him by a stranger and assigned to him by his creditor, there is no renewal or continuation of the original debt, but an extinguishment of it, and the lien pertaining to it is lost. It is a new debt, and the remedy of the assignee against the assignor is the only one, in case of the insolvency of the debtor.<sup>5</sup> So if the note of a firm be taken in satisfaction of a claim for work and materials furnished to one of the partners, and though the set-

<sup>1</sup> *Graham v. Holt*, 4 B. Mon. (Ky.) 61; *Finch v. Redding*, Id. 88; *Morrison v. The Laura*, 4 Mo. 260.

<sup>2</sup> *Scott v. Ward*, 4 Iowa, 112.

<sup>3</sup> *Hawley v. Warde*, Id. 36.

<sup>4</sup> *Brady v. Anderson*, 24 Ill. 110.

<sup>5</sup> *Muir v. Cross*, 10 B. Mon. (Ky.) 277.

tlement is made in accordance with the usual mode of doing business between the parties, a mechanics' lien cannot afterwards be sustained for the same against *bona fide* purchasers.<sup>1</sup> Or, where E. and D., partners, were indebted to H. and E. for labor and materials which might be a lien upon their buildings, and H. and E. discharged the debt against E. and D., and took the note of D. in satisfaction, the lien, if any existed, was lost.<sup>2</sup> One of the members of a firm owned a lot, and he purchased lumber to improve it, and the firm's note was given in payment, — that is such additional security as to discharge the lien. But if the firm had ordered the lumber to be placed on the premises, and it was used in the improvement of the same, and the firm afterwards gave their note for the amount, it would not thus operate.<sup>3</sup> That the contractor, as a security, obtains the signature of a third party to the contract with the owner, is not a waiver of his lien.<sup>4</sup> So taking a guaranty from a third party to a limited amount not sufficient to cover the whole claim is not a waiver of lien. The intention to waive must clearly appear, as by taking security inconsistent with the idea of a mechanics' lien.<sup>5</sup>

§ 279 a. **When not a Waiver.** — The lien of a sub-contractor, as against the owner, is not impaired by taking security from some other party, unless it is expressly agreed that the security shall operate as payment. Thus, where a contract provided that the contractor agreed "to pay" for such work as follows: give his notes, payable at bank in two months after completion of said work. This is not an express agreement to take the notes in satisfaction of the debt. The word "pay" means liquidation and not satisfaction.<sup>6</sup> Acceptance of notes, though taken in the name of a third party, if the mechanic subsequently becomes the owner of them, does not prevent him from filing his lien.<sup>7</sup> The acceptance by the owner of a building, of an order drawn on him by the contractor in favor of a sub-contractor, unless received by such sub-contractor as absolute payment, is not a discharge of his lien on the building.<sup>8</sup> A lien is not discharged by the fact that the person having the lien takes from the owner the negotiable notes of a third party payable to himself (the lienholder), he giving at the time he took them a receipt containing the provision that the notes should not be regarded as a payment

<sup>1</sup> Benneson v. Thayer, 23 Ill. 374.

<sup>2</sup> Dutton v. N. E. Mut. Fire Ins. Co., 29 N. H. 153.

<sup>3</sup> Croskey v. Corey, 48 Ill. 442.

<sup>4</sup> [Jodd v. Duncan, 9 Mo. App. 417.]

<sup>5</sup> [Peck v. Bridwell, 10 Mo. App. 524, 526.]

<sup>6</sup> Tiley v. Thousand Island Hotel Co., 16 N. Y. Supreme Ct. 428.

<sup>7</sup> Bashor v. Nurdyke, 25 Kan. 222.

<sup>8</sup> Meeks v. Sims, 84 Ill. 422.

of the bill, unless paid. Nor does the person taking such notes convert them to his own use, so as to make them an absolute instead of a conditional payment, by agreeing with the makers to compromise them for a less sum than the amount due thereon, upon a condition which has not happened, even though the notes had been indorsed to a third party to hold until the condition was performed.<sup>1</sup> Nor will the receiving of an assignment of an insurance policy, without evidence that he received it with such intention, operate as a release or waiver of his lien.<sup>2</sup> So, taking the note of debtors in their partnership name indorsed by some of them individually, does not waive the lien, as no one was bound as indorser, except those who were bound as makers, who owed the claim, and no additional security was thereby acquired.<sup>3</sup> So when the notes of a third person are given expressly as collateral security, in accordance with the original contract of the parties,<sup>4</sup> or there is a mere promise by a subsequent purchaser of property subject to a mechanics' lien, in consideration of forbearance, to pay the demand secured by the lien, it is not discharged.<sup>5</sup> Neither does the fact that interest was to be added to the note, as in other contracts.<sup>6</sup> The taking of a note from a third person as collateral security is not a waiver of a material-man's lien. The statute says nothing about the effect of personal security, and the doctrine of implied waiver from taking personal security is unsound.<sup>7</sup> So in Wisconsin the acceptance of promissory notes of a third person for the amounts due for materials and labor, does not discharge the lien therefor unless such notes are expressly received in payment; and the burden is upon the debtor to show by direct and positive proof that the creditors agreed so to receive them. The receipting of the original accounts as paid in full by such notes raises no presumption that the debt is paid. The president of a corporation gave his individual notes for the amounts due for labor and materials used in erection of a building for the company, and the accounts were receipted as paid by such notes. Thereupon the company issued stock to the president in consideration of his assumption of such debts. Held, that these facts would not prevent the enforcement of liens for such labor and materials.<sup>8</sup> But whether the note of such third person be an extin-

<sup>1</sup> *Prentiss v. Garland*, 67 Me. 345; *Crosby v. Redman*, 70 Me. 56.

<sup>2</sup> *Clark v. Moore*, 64 Ill. 273.

<sup>3</sup> *Millikin v. Armstrong*, 17 Ind. 456.

<sup>4</sup> *Montandon v. Deas*, 14 Ala. N. S. 33.

<sup>5</sup> *Mervin v. Sherman*, 9 Iowa, 331.

<sup>6</sup> *Wheeler v. Schroeder*, 4 R. I. 383; *Bailey v. Hull*, 11 Wis. 289.

<sup>7</sup> [*Ford v. Wilson*, 85 Ga. 109, 115.]

<sup>8</sup> [*Allis v. Meadow Springs Distilling Co.*, 67 Wis. 16.]

guishment of the lien or not, if the note be not collected for want of proper diligence on the part of the holder, the loss must fall upon him who was guilty of laches resulting in its non-collection.<sup>1</sup>

§ 279 *b*. **Statutory Provisions as to Collateral Security.** — Some States have endeavored to settle by legislative enactment the question of waiver of lien where collateral security has been taken.<sup>2</sup> Thus in Iowa, where a statute provides that "no person is entitled to a mechanic's lien who takes collateral security in the same contract," the acceptance of a promissory note is not a waiver, unless such is the agreement, nor is the taking of a mortgage from the debtor on the same property; nor will an action to foreclose the mortgage be considered such, basing the claim on the account for materials furnished.<sup>3</sup> So where a party loses his lien by taking collateral security, and a contract for work upon a railroad recited "that all the money for the work should be paid by the citizens of D.," it was held that this did not constitute the contractor the holder of collateral security.<sup>4</sup> In another case under the same statute it was said, although a mechanic may forfeit this right by the taking of collateral security, such security may be surrendered and the lien, by agreement of the parties, restored; and when so restored it becomes as valid between the parties, or those subsequently acquiring rights, as though no security had been taken.<sup>5</sup> To the same effect, though a statute provided "that none of the persons named shall have a lien, if they shall have taken security," the taking of a bill of exchange by a lumberman on which no one became liable except his original debtor, is not a waiver of the lien.<sup>6</sup> Where by special enactment the lien is to be deemed waived if the mechanic takes collateral security, a statement in a contract between a railroad company and a construction company, that the former would pay the latter out of a certain fund, — the subscription of a particular county along the road, — is not such a taking by the latter company of a collateral security as to vitiate the lien.<sup>7</sup> Section 2129 of the code of Iowa of 1873 provides that "no person is entitled to a mechanics' lien who takes collateral security on the same contract." Under this statute, as construed by the supreme court of Iowa, the holder of a claim for labor or materials for a building, erection, or

<sup>1</sup> Pack v. Carder, 4 Bush (Ky.), 121.

<sup>2</sup> Kentucky.

<sup>3</sup> Gilcrest v. Gottschalk, 39 Iowa, 311.

<sup>4</sup> Delaware v. Davenport, 46 Iowa, 406.

<sup>5</sup> Getchell v. Musgrove, 54 Iowa, 744.

<sup>6</sup> Gere v. Cushing, 5 Bush (Ky.), 304.

<sup>7</sup> Removal Cases, 100 U. S. 457.



improvement upon land, does not waive his right to a mechanics' lien by taking security upon the same contract, and upon the same property, unless it appear affirmatively that it was his intention to look to such security and not to his mechanics' lien.<sup>1</sup> If, however, the security taken to be upon other property besides that upon which the mechanic's lien rests, it is collateral security within the meaning of the statute, and the mechanics' lien is waived. Accordingly, it was held, that a party who had furnished material to be used in the construction and repair of a railroad, and who took as collateral security certain bonds secured by mortgage upon one division of said railroad, including the rolling stock, had waived his mechanics' lien.<sup>2</sup> It must appear that the plaintiff intended to rely on collateral security, and not on the lien, and the security must be on different property. A mortgage on a part of the railroad, the whole of which is subject to the lien, is not a security on the same property, and the lien is waived.<sup>3</sup>

§ 280. **Agreement for or Acceptance of Mortgage.**<sup>4</sup>—The acceptance, by one having a mechanics' lien upon a building, of a deed of trust upon the same property, to secure the payment at a future day of promissory notes given for the debt which gave rise to the lien, amounts to a waiver. Such conduct is entirely inconsistent with the idea of the continuance of the lien. The notes being for the same debt, and payable at a future day, the lien cannot be enforced during the time they have to run; and, as there is a power in the trustees to sell the premises for their payment, no end can be attained by holding on to the lien.<sup>5</sup> Taking a mortgage on the same property for the amount due is a waiver of the lien.<sup>6</sup> The same views have been expressed by other courts, when holding that a mortgage is a species of security entirely inconsistent with the idea of a mechanics' lien upon the same land, as a security for the same debt.<sup>7</sup> Where, by a building contract, the material-men agree to take in payment second mortgages upon some of the houses, and it does not appear that demand has been made for such mortgages, or that there is inability to give them, the statutory lien is waived.<sup>8</sup> If a contract is made inconsistent with the lien it is waived. And

<sup>1</sup> [Hale, Ayer & Co. v. The B., C. R. & N. R. R. Co., 2 McCrary, 558.]

<sup>2</sup> [Hale, Ayer & Co. v. The B., C. R. & N. R. R. Co., 2 McCrary, 558, 559.]

<sup>3</sup> [Hale v. R. Co., 13 Federal Reporter, 203.]

<sup>4</sup> This section was cited with approbation in Weaver v. Demuth, 40 N. J. L.

240; also in Trullinger v. Koford, 7 Oreg. 232.

<sup>5</sup> Gorman v. Sagner, 22 Mo. 137; Grant v. Strong, 18 Wall. (U. S.) 623.

<sup>6</sup> Trullinger v. Koford, 7 Oreg. 228.

<sup>7</sup> Barrows v. Baughman, 9 Mich. 213.

<sup>8</sup> Weaver v. Demuth, 40 N. J. L. 238.

where a material-man agrees to take a mortgage for the sum due him, he cannot refuse the mortgage and claim a lien.<sup>1</sup> Again, the taking additional security for the amount of a debt, by a chattel mortgage duly executed, on personal property, to secure the payment of the note given for materials, discharges the lien. In this case the court say the settled doctrine is, that a vendor of land waives his lien whenever he takes distinct security for the payment of the purchase-money, such as a deposit of stock, a pledge of goods, a mortgage on real or personal property, or the responsibility of a third person; and there is no difference in principle between such a lien and the lien of the material-man; both are secret liens.<sup>2</sup> In these cases of waiver, if the question only concern the immediate parties to the deed, it is a matter ordinarily of little consequence how it is determined. But when the acts of individuals become the motive to the conduct of others, it is important that such acts should be made to bear their natural construction, so that deceit and imposition upon third persons may be prevented. And though one of the parties to the transaction is overreached, or was in error as to its consequences, that error cannot be remedied at the expense of third persons.<sup>3</sup> But on the other hand, where a builder entered into an agreement with a party who was in possession of land, under a contract to repair a building thereon for \$3,286, and took a mortgage upon other land to secure said sum, and upon completion of the work he filed a lien, foreclosed the mortgage, realizing thereby \$1,025, and entered a personal judgment for the deficiency, it was held that he had not waived his lien, and was entitled to pursue all the remedies he had, until he realized the amount of his claim.<sup>4</sup> So the acceptance of a deed of trust by an individual to secure his individual debt, and in which he includes a mechanics' lien belonging to the firm of which the trustee is a partner, does not release the lien any more than if the trustee was an entire stranger. The transaction with the trustee not being in the name of his firm, or by any agreement, express or implied, in behalf or for the benefit of the firm, the case stands upon the legal effect of the trust deed.<sup>5</sup> A conveyance of property to a trustee to secure a mechanic for work, which is not accepted, does not impair the lien.<sup>6</sup>

<sup>1</sup> [Willison v. Douglas, 66 Md. 99, 102, citing Grant v. Strong, 18 Wall. 623.]

<sup>2</sup> Kinzey v. Thomas, 28 Ill. 502; Gardner v. Hall, 29 Ill. 279.

<sup>3</sup> Gorman v. Sagner, 22 Mo. 137.

<sup>4</sup> Hall v. Pettigrove, 17 N. Y. Supreme Ct. 609.

<sup>5</sup> Parberry v. Johnson, 51 Miss. 291.

<sup>6</sup> Graham v. Holt, 4 B. Mon. (Ky.) 61.

§ 281. **Effect of Credit beyond Statutory Period for enforcing Lien.** — As we have seen, the note of a debtor is not payment of his debt, and the acceptance and transfer of such note by the creditor suspends his remedy for the debt only until the title of the creditor is reinvested;<sup>1</sup> it therefore follows that the mere giving of credit does not necessarily displace the lien.<sup>2</sup> But these laws have dispensed with none of the elements in this class of cases, which are ordinarily necessary to give a right of action. They in no way modify or change the obligation of the contract. Accordingly, if the mechanic choose to give so extended a credit that no action could be maintained until after the time during which a lien could be secured has elapsed, he must be deemed to have voluntarily waived his lien, and relied upon the personal security of the parties to whom the credit was given.<sup>3</sup> The legitimate and reasonable inference from such extended credit is, that the parties understood and intended that the notes should be substituted in the place of the plaintiff's claim under his contract, that thereby, by a negotiation of the notes, he might obtain the money which would be due to him in anticipation of the completion of the work, and the person for whom the work was done might postpone to a later day the payment of the sum which would otherwise fall due as soon as the work was finished. Under such circumstances, if a petitioner has commenced an action to recover the amount due for his services and the labor and materials furnished by him, immediately after the completion of the work, there can be no doubt he would fail to maintain it. It would be a good defence that notes payable at a future day have been given for the full amount due under the contract.<sup>4</sup> The acceptance of a note payable at a future day, by a creditor claiming the lien, is an abandonment of the lien, if by the terms of the note the time of payment has been extended beyond the date fixed by statute for its enforcement.<sup>5</sup> Another court, in holding the same doctrine, said: "The necessary consequence would seem to be, that if a party place himself in a position which renders him unable to bring a suit to enforce the lien within the time limited by statute, he thereby virtually waives it, having deprived himself, by his own voluntary act, of the right to enforce it." Thus, where a party brought his action within the period allowed, but as only one of the notes which he

<sup>1</sup> Teaz v. Chrystie, 2 E. D. Smith (N. Y.), 621.

<sup>2</sup> The Highlander, 4 Blatchf. 55; Peyroux v. Howard, 7 Pet. (U. S.) 324.

<sup>3</sup> Scudder v. Balkam, 40 Me. 291.

<sup>4</sup> Green v. Fox, 7 Allen (Mass.), 85.

<sup>5</sup> Ehlers v. Elder, 51 Miss. 499.

had accepted fell due within that period, the lien could only be enforced to that extent, as the bringing of the suit could not save the lien so far as the other notes were concerned, because no action could be maintained upon them until they became due.<sup>1</sup> The fact of a note given for materials or labor being outstanding and not due suspends the right to file a lien and bring suit upon that portion of a running account which that note represented.<sup>2</sup> So, where a statute gives a lien on a boat, but which is to cease twelve days after the vessel has left the port, a credit for three months after the work is completed is inconsistent with the lien, and waives it.<sup>3</sup> The giving of credit for materials is not a waiver of the lien; though if the time of credit is so extended that it would probably go beyond the time for enforcing it, that fact might be evidence tending to show a waiver.<sup>4</sup> Wisconsin has enacted that "the taking of a promissory note, or other evidence of indebtedness, for labor or materials, shall not be deemed to waive the right of the party taking the same to prosecute and perfect his lien in the manner provided by law;" and in that State, also, the mechanic does not lose his lien under the statute, by taking the note of the owner of the building, payable within the time allowed by law for commencing an action to enforce the lien.<sup>5</sup> In a later case, it was said that taking a promissory note suspends action on the original debt until the note becomes due, but is not a waiver of the demand.<sup>6</sup> If a material-man after completing the supply of materials takes a note for the whole amount due him from the contractor payable after the period for filing his lien or giving notice, he waives the lien.<sup>7</sup> Taking a note from the debtor suspends the mechanics' remedy until the note comes due,<sup>8</sup> unless otherwise agreed in the note.<sup>9</sup> But it has been held that the claimant may cancel a renewal note or the judgment on it, and then claim his lien, where the original note was payable within the lien period, and the renewal was obtained by an assignee of the note, and not by the lienor. C. being entitled to a mechanics' lien took a note payable within a year after completion of the

<sup>1</sup> Pryor v. White, 16 B. Mon. (Ky.) 605.

<sup>2</sup> Dey v. Anderson, 39 N. J. L. 199.

<sup>3</sup> The Highlander, 4 Blatchf. 55; Emerson v. St. B. Shawano City, 10 Wis. 433; St. B. Charlotte v. Hammond, 9 Mo. 58.

<sup>4</sup> Mehan v. Thompson, 71 Me. 492.

<sup>5</sup> Schmidt v. Gilson, 14 Wis. 514; Bailey v. Hull, 11 Wis. 289.

<sup>6</sup> White v. Dumpke, 45 Wis. 454.

<sup>7</sup> [Quinby & Co. v. Wilmington, 5 Houst. (Del.) 26; McPherson v. Walton, 42 N. J. Eq. 282, 286; Dey v. Anderson, 10 Vr. 199.]

<sup>8</sup> [Cox v. Keiser, 15 Bradw. 432.]

<sup>9</sup> [Sheirick v. Roderick, 20 Bradw. 622.]

work, and assigned it to D., who took a renewal note extending the time beyond the statute period, and took judgment on it, C. took an assignment of the judgment, and offered to cancel it as the court should direct. It was held that C. had a right to a decree of lien.<sup>1</sup> A lien is not lost by the acceptance of notes maturing beyond the lien period, if such acceptance was induced by fraud, as by concealing the insolvent condition of the debtor.<sup>2</sup>

§ 282. **Distinction between filing Notice of Lien and instituting Suit.**<sup>3</sup>—The time for instituting the suit to enforce the lien must have expired before the note or other security becomes due, in order to produce a waiver; not so with a note which expires with the period allowed for filing the lien.<sup>4</sup> And inasmuch as in proceedings under the mechanics' lien laws the filing of a notice of lien is not ordinarily the bringing of a suit, if a contractor, who has furnished materials for and expended work and labor upon the construction of a building for another, receive from the latter a promissory note for the sum due, payable at a time beyond the expiration of the period within which he must file his lien, but within the period in which suit must be commenced, if at all, to enforce the lien, he will not thereby have waived his right to file his lien, or to enforce the same against the building; he merely suspends his right of action;<sup>5</sup> but in such case the note must be produced to be surrendered at the trial.<sup>6</sup> So, under a statute that "any person who shall . . . perform any labor . . . shall, upon filing a notice within six months after the performance of such labor, . . . have a lien for the value of such labor," etc., taking the note of the contractor for the amount of the work or materials, does not deprive the claimant of his right to acquire a lien under this statute; and such lien may be acquired by filing a notice before the note is due, although the lien cannot be enforced until the money is payable. The claimant may then have an enforcement of the lien, unless the term of credit given by him to the contractor was so long that the lien shall have expired by the limitation which the statute has affixed to it.<sup>7</sup> The same rule holds where the building agreement provides for the payment of the price in

<sup>1</sup> [Chisholm v. Williams, 128 Ill. 115.]

<sup>2</sup> [Phoenix Iron Co. v. Vessels, &c., 43 Hun, 429.]

<sup>3</sup> This section was cited with approbation in Delaware v. Davenport, 46 Iowa, 413.

<sup>4</sup> Bodley v. Denmead, 1 W. Va. 249.

<sup>5</sup> McMurray v. Taylor, 30 Mo. 263; [Jones v. Hurst, 67 Mo. 568, 572; Van Stone v. Stillwell, &c. M'fg Co., 142 U. S. 128, 136.]

<sup>6</sup> Ashdown v. Woods, 31 Mo. 465.

<sup>7</sup> Miller v. Moore, 1 E. D. Smith, 739.

instalments, some of which are to become due *after* the time limited by the statute for action to enforce the lien, and the contract is broken within said time. Such agreement is not a waiver of the lien. And if the owner of the building breaks the agreement by failing to pay an instalment at the agreed time, and the statute period has not yet run out at the time of said breach, the builder may bring suit on the lien.<sup>1</sup> Acceptance of the note of a debtor is not, *prima facie*, payment of an antecedent debt. The original indebtedness is not thereby extinguished, but the right of action is suspended until the maturity of the note. After maturity, the note being unpaid, he may bring suit on the original indebtedness, and surrender the note, and if it matures before the expiration of the time within which suit must be commenced, the statutory lien is not thereby waived or defeated.<sup>2</sup>

§ 283. **Collateral Security.**<sup>3</sup> — If, however, as a matter of fact, a note, although payable at a future day, is given and accepted as collateral security only, and not in payment or suspension of the original debt, the lien will not be discharged. In Pennsylvania it has been held that, where a creditor takes from his debtor a note payable at a future day, on account of his claim, the law raises no implication that he agrees to give time, until the maturity of the note, for the payment of the original debt; but the agreement must be proved as a fact, dependent upon the understanding of the parties at the time when the security was given. Therefore, where material-men took from a contractor his notes, receipting for them as "in full for brick delivered to a church," against which they filed their lien and proceeded upon it before the notes became due, and it was found by the jury that the notes were not received in satisfaction of the debt, it was held that a binding agreement that the plaintiffs were not to sue for the original debt until the notes matured could not be implied from the transaction.<sup>4</sup> The modern English cases seem to recognize the doctrine that the taking a negotiable security for and on account of a debt operates *prima facie* to suspend the creditor's right to sue for the debt until the new security becomes due.<sup>5</sup> The later Pennsylvania decisions take

<sup>1</sup> [Van Stone v. Stillwell, &c. M'fg Co., 142 U. S. 128, 135-136.]

<sup>2</sup> [Lane v. Jones, 79 Ala. 156; Phillips, § 282, cited with approval.]

<sup>3</sup> This section was cited with approbation in Delaware v. Davenport, 46 Iowa, 413.

<sup>4</sup> Shaw v. First Ass. Presb. Church, 39 Penn. 226.

<sup>5</sup> Walton v. Mascal, 13 M. & W. 452; Baker v. Walker, 14 M. & W. 465; Price v. Price, 16 M. & W. 232; Fellows v. Prentiss, 3 Den. 518.

different ground, and follow the ruling of another English case,<sup>1</sup> in which it was decided that the acceptance of a new bill from the acceptor of a former bill, after it had become payable, for the payment of the same debt at a future day, could only be considered as taking a collateral security, and therefore did not amount to or imply giving time to the acceptor, and consequently did not release the other parties to the bill first given; or in other words, taking a new note for the same debt mentioned in the old, without any agreement to give time to the maker, or to deliver up the old note to him, or that the new shall be taken in satisfaction of the old note, is to be considered a mere collateral security, which does not affect or alter the original liabilities of the parties on the old note in any respect whatever.<sup>2</sup> The subjoined cases substantially hold, also, that there is no implication that the creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note payable at a future day on account of it. They maintain that the law raises no such agreement, and, if there be one, it is to be proved as a fact dependent for its existence on the understanding of the parties at the time when the security is given.<sup>3</sup> In Iowa, "no one is entitled to a lien, who, during the progress of the work, erection, building, or other improvement, shall take any collateral security on such contract. But after the completion of such work, and where the contractor or other person shall have become entitled to claim or have a lien, the taking collateral or other security shall not affect the right to such mechanics' lien," unless it has been so agreed.<sup>4</sup> The object of the statute is to prevent any one from obtaining a lien who takes security before completing his contract.<sup>5</sup> An agreement by the husband, who, as agent of the wife, orders materials for a building on her land, to bind himself also for payment, as by a joint note of himself and wife, does not constitute the taking of collateral security by the material-man so as to defeat his right to a lien.<sup>6</sup> In Minnesota, notes, the term of which does not extend beyond the time of enforcing a lien, will not divest the lien; nor will a chattel mortgage security given by the debtors.<sup>7</sup> A deposit of money on behalf of the owner and con-

<sup>1</sup> *Pring v. Clarkson*, 1 B. & C. 14.

<sup>2</sup> *Weakly v. Bell*, 9 Watts (Penn.), 273.

<sup>3</sup> *Ripley v. Greenleaf*, 2 Vt. 159; *U. S. v. Hodge*, 6 How. (U. S.) 279; *Wade v. Stanton*, 5 How. (U. S.) 371; *Elwood v. Diefendorff*, 5 Barb. 398; *Powell v. Henry*, 27 Ala. N. S. 612; *Hopkins v. Forrester*, 39 Conn. 351.

<sup>4</sup> [*Bissell v. Lewis*, 56 Iowa, 231, 239.]

<sup>5</sup> [Id.]

<sup>6</sup> [*Bissell v. Lewis*, 56 Iowa, 231, 236.]

<sup>7</sup> [*Howe v. Kindred*, 42 Minn. 433, 436.]

tractor in pursuance of the contract to secure payment for the materials to be supplied prevents the material-man from having a lien.<sup>1</sup>

§ 284. **Personal Security of the Debtor.**<sup>2</sup>—In the same direction it has been decided in Pennsylvania, that the mechanic or material-man may have the personal responsibility of the party contracting or purchasing, or accept other securities, and at the same time have his lien on the building, they being collateral and cumulative to each other; and that he will not be deprived of his lien unless the parties contract that the personal liability or the acceptance of other securities shall be a waiver.<sup>3</sup> If, however, where a party has furnished material to a contractor who abandons the work, and the material-man then agrees with the owner to receive a sum certain for work and materials already furnished, upon consideration that he shall pay all outstanding bills for such work and materials, it is the acceptance of a personal responsibility of the owner for a fixed sum, and is a waiver thereby of the lien.<sup>4</sup> But the mere acceptance of the bond of the debtor is not an abandonment of the lien;<sup>5</sup> nor where there is an agreement to pay for a building, and the mechanic accepts the guaranty of another for the performance of the contract on the part of the owner.<sup>6</sup> Taking a debtor's note maturing within the time allowed for perfecting and enforcing a lien is not in general to be deemed a payment, or to affect the right to a lien.<sup>7</sup> But these are all questions dependent on the intention of the parties manifested by the circumstances of each case, and proper questions to be decided by a jury, under the guidance of the court, for which purpose parol evidence is admissible.<sup>8</sup>

§ 285. **No Waiver when Agreement to give Security is not performed.**<sup>9</sup>—Whatever diversity of authority may exist as to the effect of giving a note, or independent security of a third person, or by mortgage, or extension of credit beyond the period in which the lien may be filed, all the cases agree that there will

<sup>1</sup> [Harrison & H. I. Co. v. Council Bluffs Water W. Co., 25 Fed. Rep. 170; Shickle H. & H. I. Co. v. Same, 33 Id. 13.]

<sup>2</sup> This section was cited with approbation in *Delaware v. Davenport*, 46 Iowa, 413. [See § 276.]

<sup>3</sup> *McCall v. Eastwick*, 2 Miles (Penn.), 45; *Hill v. Witmer*, 2 Phila. 72.

<sup>4</sup> *Whitney v. Joslin*, 108 Mass. 103.

<sup>5</sup> *Kinsley v. Buchanan*, 5 Watts (Penn.), 118.

<sup>6</sup> *Hinchman v. Lybrand*, 14 Serg. & R. 32.

<sup>7</sup> [*McKeen v. Haseltine*, 46 Minn. 426.]

<sup>8</sup> *St. B. Charlotte v. Hammond*, 9 Mo. 58.

<sup>9</sup> This section was cited with approbation in *Weaver v. Demuth*, 40 N. J. L. 240; *Delaware v. Davenport*, 46 Iowa, 413.



be no waiver when the agreement to give the note or other security has not been performed by the promisor.<sup>1</sup> It would be going too far to say that the builder must have intended to waive the lien in the event of the refusal to comply with the agreement. The contrary proposition comes down to that. There is certainly much justice in saying that, on the debtor's refusal to keep the agreement, the builder also ought not to be bound by it, but should be remitted to his rights independently of the contract.<sup>2</sup> Accordingly, an agreement to extend the time of payment beyond the period limited by the statute, provided a mortgage should be given, will not defeat a mechanics' lien, if the mortgage should not be executed, as the giving of the mortgage was a condition precedent. The agreement was executory, and until the mortgage should be delivered as provided, all the obligations of the principal agreement, including the time of payment, remained in full force.<sup>3</sup> So, a provision in a building contract, that the claimant shall take in payment the note of the owner, payable in one year, with a satisfactory indorser, does not, where the note is not delivered pursuant to the contract, deprive him of his right of action to enforce a lien for the value of his labor and materials.<sup>4</sup> Where a party furnished materials for the construction of a building, under an agreement that the owner thereof, by way of payment for them, would convey to him certain real estate at a stipulated price per foot, it was held that on the refusal of the owner so to convey, or in lieu thereof to pay for such materials, the party is entitled to his lien, provided that in due time he gives the notice required by law.<sup>5</sup> A sub-contractor having discharged a notice of lien filed by him, upon the promise of the contractor to pay certain notes that had been given for work done, which promise was broken, it was held that the sub-contractor could file a new notice of lien.<sup>6</sup> A release of lien under seal, executed on a promise to pay the money, is void for failure of consideration. There is a distinction between want of and failure of the consideration stipulated for at the time of the execution of the release.<sup>7</sup> There may, however, be sufficient elements of estoppel in the case in spite of the non-execution of the notes. In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found

<sup>1</sup> [Globe, &c. Co. v. Doud, 47 Mo. App. 439; Chicago & Alt. R. R. Co. v. Union Rolling Mill Co., 109 U. S. R. 702.]

<sup>2</sup> The Highlander, 4 Blatchf. 55.

<sup>3</sup> Gardner v. Hall, 29 Ill. 277.

<sup>4</sup> Lutz v. Ey, 3 E. D. Smith, 621; *vide* Wheeler v. Schroeder, 4 R. I. 383.

<sup>5</sup> McMurray v. Brown, 91 U. S. 257.

<sup>6</sup> Haden v. Buddensick, 6 Daly (N.Y.), 3.

<sup>7</sup> Benson v. Mole, 9 Phila. 66.

that, at or before the filing of the notice of lien, the plaintiff assented to a sale, which was made to third parties, and agreed to accept three notes secured by a second mortgage on the vessel as security. It was held, such agreement was a waiver of the lien. The fact that the notes and mortgage were never in fact executed pursuant to agreement does not vitiate the waiver, it not appearing that their execution was a condition precedent to the sale, etc.<sup>1</sup>

§ 286. **Receipts and Part Payments, etc.** — In the absence of explanatory circumstances, it has been almost universally considered that the mere fact of giving to the debtor, on the receipt of his note, "a receipt in full," will not of itself operate as an extinguishment or discharge of the lien, if the note be not paid;<sup>2</sup> so, where an ordinary receipt acknowledging payment for the value of the work for which the claim is made<sup>3</sup> without a special agreement.<sup>4</sup> So, where the written contract, under which work is done or materials are furnished at a stipulated price, provides, that such price shall "be payable when the job is completed, in satisfactory six months paper, interest added," the delivery and receipt of the employer's notes, or his draft, as "the satisfactory paper" under such a contract, is not final payment of the price stipulated in it, but conditional only upon the paper being paid at maturity, and does not, therefore, discharge the mechanics' lien, although a receipt be given by him for the paper as "in full to date."<sup>5</sup> A statement in the receipt to the effect that the note was taken "in settlement of the account," was no waiver, and was held not to be sufficient alone to authorize the court to submit to the jury, by instruction, the issue whether the note was taken in payment or satisfaction of the account.<sup>6</sup> But in another case, it was decided that if a receipt be given at the foot of the bill for the note, "in full of the above," it was evidence of satisfaction, which should have been left to the jury.<sup>7</sup> As a contrary authority to the foregoing, it was held that where a builder took notes for his claim, and gave a receipt "in full," in the absence of proof showing the intention, it discharged the lien;<sup>8</sup> but this authority has been subsequently doubted by the same court.<sup>9</sup> Receiving a conveyance of real estate as part payment of a claim

<sup>1</sup> [Kornegay v. Styron, 105 N. C. 14.]

<sup>2</sup> Greene v. Ely, 2 Iowa, 508; Goble v. Gale, 7 Blackf. (Ind.) 218.

<sup>3</sup> Althause v. Warren, 2 E. D. Smith, 657.

<sup>4</sup> Morrison v. The Laura, 40 Mo. 260; St. B. Charlotte v. Hammond, 9 Mo. 58.

<sup>5</sup> Wheeler v. Schroeder, 4 R. I. 383.

<sup>6</sup> McMurray v. Taylor, 30 Mo. 263.

<sup>7</sup> Jones v. Shawhan, 4 Watts & S. 257.

<sup>8</sup> Rose v. Persse, 29 Conn. 256.

<sup>9</sup> Chapin v. Persse, 30 Conn. 461.

for erecting buildings thereon, is not a waiver of the lien for the residue, any more than the acceptance of money as part payment would be.<sup>1</sup> The receipt of a dividend in bankruptcy does not prevent a mechanic from proceeding upon the lien for the balance due.<sup>2</sup> A party filed a lien for materials furnished for thirty houses; he released fifteen houses upon being paid the full value of the materials which went into those houses. Held, that the lien upon the remaining fifteen houses for the balance of his account was not affected by the release.<sup>3</sup>

<sup>1</sup> Bayard v. McGraw, 1 Bradw. Ill. 134.

<sup>2</sup> Streeper v. McKee, 86 Penn. 188.

<sup>3</sup> Hall v. Sheehan, 69 N. Y. 618.

## CHAPTER XXV.

## PAYMENTS.

§ 287. **Application of Payments.** — The lien of the mechanic being only a remedy, dependent upon a debt due for the materials and labor furnished, the principles of application of payments to this debt are the same as in other matters between debtor and creditor. As the payment is voluntary on the part of the debtor, he may, at or before the time of payment, prescribe the application of the payment, and thus discharge at his pleasure, when he is indebted on more than one account, the lien on particular property to the exclusion of other, or liquidate an indebtedness unsecured in preference to that protected by the lien, or *vice versa*; and if the mechanic accept the payment, he is, by such acceptance, bound to the conditions which the debtor has appointed, even though at the time he expressly refused to admit them. If there has been no actual appropriation by the mechanic at or before the payment either expressly declared or to be inferred from circumstances, his right to control the application is gone; the right after that belongs to the creditor, who may make any application that he pleases.<sup>1</sup> As where mechanics, in addition to their claim of lien, had also a claim on book account against the owner of the premises, which was unsecured, and there was no appropriation of certain payments by the defendant, they were entitled to appropriate it to the book account in preference to the old debt secured by the lien. Their books of original entries were admissible in evidence for that purpose.<sup>2</sup> Where a party performs labor for another in a case where he would be entitled to a lien for one part of his labor, and not for the balance, he may properly charge for his labor under two accounts. And if the debtor at the time of payment of any sum, fails to make an appropriation to one or other of the accounts, the creditor may do so at any time before he files his lien.<sup>3</sup> So it would be no defence to a suit on mechanics' lien

<sup>1</sup> 1 Am. Lead. Cas. 276.

<sup>2</sup> McQuade v. Stewart, 48 Penn. 198.

<sup>3</sup> Christnot v. M. G. & S. M. Co., 1 Mont. 48; Capron v. Strout, 11 Nev.

304; Bean v. Brown, 54 N. H. 395;

Dey v. Anderson, 39 N. J. L. 199; Cuer

v. Ross, 49 Wis. 652.

that the contractor had paid money enough to satisfy the debt, when it further appeared that the money had been paid on a general account for materials used in erecting various buildings, and that the plaintiff, in the absence of directions from the contractor, had applied the payments to other buildings than that whereon the lien had attached.<sup>1</sup> When a contractor pays money to one M., who has furnished him with materials for this and prior contracts, M. may in the absence of specific directions appropriate the payment to prior accounts, although he knows the money was derived from the last contract. The owner, to protect himself, will have to see that M. has notice that the money was paid to the contractor on the understanding that it should be applied to debts arising under it.<sup>2</sup> When it appears that the contractor was indebted to plaintiff on buildings other than the one described in the petition, and that payments were made on the general account and not on that of any particular building, the lien is not thereby discharged, unless the payments are sufficient to discharge all the debts. The effect of such payments would depend upon the application made by the contractor, at the time of payment, or in default of such application then upon that made by plaintiff at that time; or if no application were made by either, then the law would apply the payments as justice and equity might require.<sup>3</sup> This right must be exercised before suit is brought. It is too late to attempt it at the trial. Thus, if a lumber merchant, who has separate liens for materials furnished to two houses, receive a payment without actual appropriation by either debtor or creditor, and suffer his lien on one of the houses to expire, he cannot, at the trial of a *scire facias* upon a claim filed against the other house, appropriate the payment made, in discharge of his demand in respect of which his lien had expired, to the injury of a third person, who, without notice, had purchased the property against which the lien was sought to be established, and which it was the duty of the vendor, the debtor, to liquidate.<sup>4</sup> In default of actual appropriation by either party, the application devolves on the law, which, it is said, will direct it according to equity. Two classes of cases arise under this head. First, where the money has been voluntarily paid by the debtor, in which the law professes to proceed upon a presumption of the intention of the parties.<sup>5</sup> But in the application of this principle, opposite conclusions have been

<sup>1</sup> *Waterman v. Younger*, 49 Mo. 413.

<sup>2</sup> [*Jefferson v. Church*, 41 Minn. 392.]

<sup>3</sup> *Gautner v. Kemper*, 58 Mo. 567.

<sup>4</sup> *Harker v. Conrad*, 12 Serg. & R. 301.

<sup>5</sup> 1 Am. Lead. Cas. 283.

reached. By the civil law, and some American cases, it is held that the law presumes, in ordinary cases, that the debtor intended to pay in the way which at the time was most to his advantage. Such intendment, it is claimed, is reasonable and natural, and one which will, in most cases, accord with what was actually the fact. In these cases, where the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law raises a presumption, for the same reason, that the payment was actually received in the way that was most to the advantage of the creditor.<sup>1</sup> The prevailing rule in England and this country is, however, directly the reverse. That application will be made by the law, which it is to be presumed that the creditor would have made, or which it is his interest to have made.<sup>2</sup> Second, where the payment is made by the law either under execution or other administration of assets; the general rule is to appropriate the payment to all the debts ratably.<sup>3</sup> All payments of money made by the contractor to the plaintiffs or their executor on general account, or the application of which were not made by him, and which were received after the first delivery for defendants' building, should be apportioned between the several accounts of plaintiffs for lumber by them furnished for the several buildings of the said contractor then in course of construction, in proportion to the amount due and remaining unpaid for each at the time of each such payment.<sup>4</sup> A payment by the owner to a sub-contractor without directions as to its application will be applied to those items for which the sub-contractor has a lien right.<sup>5</sup>

§ 288. **Conclusive as to Other Creditors, when Bona Fide.** — The appropriation of payments is particularly the office of debtor and creditor, and if they agree and there is no fraud, it is conclusive upon other creditors. But it must be left to the jury to say from the evidence whether there was an appropriation or not; and, if not, how much was due upon the particular property against which the lien was entered. As where a mechanic had performed work on two properties of the same owner, and a settlement was made, acknowledging a certain balance due him, such balance might be a fair lien on either one of the properties, and parties not lien creditors at the time were bound by it.<sup>6</sup> So

<sup>1</sup> Harker v. Conrad, 12 Serg. & R. 301.

<sup>2</sup> 1 Am. Lead. Cas. 283.

<sup>3</sup> Id. 292.

<sup>4</sup> [Ballou v. Black, 17 Neb. 389.]

<sup>5</sup> [Nelson v. Withrow, 14 Mo. App. 270.]

<sup>6</sup> Stewart v. McQuaide, 48 Penn. 195.

payment of a debt secured by a lien may operate either as a discharge or an assignment, as may best subserve the intention of the parties.<sup>1</sup> The preceding cases present questions of application of payments arising out of distinct and independent transactions. Where, however, it appears that there is no evidence of any accounts or transactions between the parties, except what arose under a building contract for a house, there can be no question involving equitable considerations in the marshalling of payments.<sup>2</sup>

§ 289. **Open Accounts.** — The rule with regard to an open, current account, the items of which do not form distinct debts, but are blended together in one account, is, that the payments will be applied, as they are paid, to the charges in the order of time in which they accrue. This case does not fall within the principle of the application of payments to distinct debts, because not the items, but only the balance of an account, is considered as a debt, and falls under the rules upon which mutual accounts are cast and settled by the law.<sup>3</sup> Accordingly, where work is done and materials are furnished, not under any special contract as to what is to be done or furnished, or at what price or time of payment, but from time to time as directed or requested, payments on account, without special application by either party at the time of payment, will be applied by the court to the charges in the account in the order of time in which they accrued, for the purpose of ascertaining what remained due at any particular time, and for what amount proceedings are to be commenced within any particular time under the requirements of the mechanics' lien law.<sup>4</sup> Where there were rights to file liens upon separate buildings, for different parts of an account, and the debtor and creditor, having treated the account as a running account, the application of a note will be made by the court to the earliest items.<sup>5</sup> Again, where a part of the items of a mechanic are unsecured by a lien, and part are, and partial payments have been made, there is no objection to crediting these payments against the first items of the account which are unsecured, and enforcing the statute remedy for the residue.<sup>6</sup> So, where a party had no lien for the part of his work performed before the passage of the statute, and partial payments were made while he was at work, these payments were credited

<sup>1</sup> *Wilson v. Kimball*, 27 N. H. 300.

<sup>2</sup> *McBride v. Crawford*, 1 E. D. Smith, 658.

<sup>3</sup> 1 Am. Lead. Cas. 291.

<sup>4</sup> *Briggs v. Titus*, 7 R. I. 441.

<sup>5</sup> *Dey v. Anderson*, 39 N. J. L. 199.

<sup>6</sup> *Hauptman v. Catlin*, 20 N. Y. 247.

against the labor done at the earliest period, and before the passage of the act securing the lien.<sup>1</sup> And in another case, where materials were furnished, at different times in the same year for the erection of buildings on adjoining lots, and separate accounts were not made of the materials furnished for the buildings on the different lots, but the items were all entered in one general account in the order of the dates of delivery, although the lien attached to the several buildings and lots, for the use of which they were respectively furnished, yet sums paid generally on account were considered as paid in discharge of the earlier items.<sup>2</sup> If part of an account filed as a mechanics' lien is for lumber furnished to the contractor before he entered into the contract, which could not be a lien, and a part afterwards, which was used in the building, and there is a credit in the account of the lumber-man for a payment, it was held that it might be referred to the jury to determine whether the payment should be applied to that part of the account which was a lien, or that which was not.<sup>3</sup>

§ 290. **Lien only enforceable when Payments are due, etc.** — The time when payment is to be made, if provided for in the contract, is binding upon all parties, and no lien can be enforced until its expiration. Or when a mode for ascertaining the time and amounts has been adopted, — as where the parties to a building contract agree that the superintendent shall pass upon the work, and certify as to the payments to be made, — his decision is final, unless fraud or mistake on his part shall be shown.<sup>4</sup> So, where the contract provided that payments should be made on the certificate of the architect, who was required by the contract, among other things, to certify that all the work of the mechanics and laborers, employed by the original contractor, had been paid, — his certificate is conclusive of the rights of all parties concerned, unless it can be shown that it was obtained by the owner by collusion or fraud.<sup>5</sup> When no provision has been made by express agreement, and, in the absence of proof to the contrary, the presumption of law is, that payment is to be made on delivery; and if a petition to enforce the lien aver that materials were to be paid for on delivery, evidence that no time was specified for their payment would sustain

<sup>1</sup> Hunter v. Savage, Con. Sil. Min. Co., 5 Nev. 153.

<sup>2</sup> Beckel v. Petticrew, 6 Ohio St. 247.

<sup>3</sup> Dickinson College v. Church, 1 Watts & S. 462.

<sup>4</sup> McAuley v. Carter, 22 Ill. 53.

<sup>5</sup> Dingley v. Greene, 54 Cal. 333.



the averment.<sup>1</sup> The same rule applies to work: payment is to be made when it is completed, if other terms are not specified.<sup>2</sup> So, where there is no other evidence of the time when materials are to be paid for, the time of payment of a promissory note given for them will be taken to be the period.<sup>3</sup> In all cases where the time when payment is to be made is material, the allegations of the petition and proofs must agree in regard thereto. A party cannot make one case by his pleadings and another by his evidence, and recover; as where it was alleged in a bill to enforce the lien that the work was to be paid for when fully completed, and the proof was that it was to be paid for by a stipulated time, no recovery could be had.<sup>4</sup>

§ 291. **Payments as to Sub-contractors, etc.** — Between the immediate parties to the contract, it is rarely important when payments are made, as the receipt of money discharges the lien *pro tanto*, at whatever stage of the building, and whether due according to the terms of the contract or not. But as material-men, sub-contractors, and laborers frequently have claims for their services, and their rights are protected in many States, either by direct lien on the premises or personal action against the owner, by appropriating what may be due from the owner to the contractor, upon their giving notice of their claims, it is important, in determining the amount due by the owner at the date of notice, to ascertain what payments to the contractor the owner may lawfully claim against such sub-contractor and others. It may be considered as established, unless something to the contrary appears in the text of the law creating the right, that notwithstanding sub-contractors and material-men may require the owner to pay to them what is due under the contract, it does not prevent *bona fide* pre-payments in advance of the terms of the contract, made before the statutory notice is given. Accordingly, where it is provided that any person may serve a notice in writing specifying the amount of his claim, "but such owner shall not be obliged to pay for or on account of such house, other building, or appurtenances, in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract," although by the terms of the building contract, payments may become payable from the owner to the

<sup>1</sup> Brady v. Anderson, 24 Ill. 110; Tipton v. Feitner, 20 N. Y. 423; Pollock v. Ehle, 2 E. D. Smith, 541; Cunningham v. Jones, 3 E. D. Smith, 650.

<sup>2</sup> Claycomb v. Cecil, 27 Ill. 497.

<sup>3</sup> Bonsall v. Taylor, 5 Iowa, 546.

<sup>4</sup> Bush v. Connelly, 33 Ill. 447.

contractor after the lien is filed, a sub-contractor has no remedy, if such payments have in good faith been previously anticipated and discharged;<sup>1</sup> and such is the case, although there is a provision that "no payment voluntarily made shall impair the lien."<sup>2</sup> Any other construction of the act would preclude the owner and contractor from in any wise altering, changing, or modifying their contract, without making the former liable to sub-contractors and workmen, upon and in conformity with the terms of the original agreement. This law subrogates the person who has furnished materials to or worked under the contractor, and filed the necessary notice *pro tanto*, to the rights of the contractor under the contract. A sub-contractor or material-man can easily protect himself against loss, by going to the owner and inquiring of him the particulars in regard to the contract, and the money due and to become due upon the same, before he furnishes the materials.<sup>3</sup> So, under a similar law, where a party contracted to pay for the work and materials on a certain building as the work progressed, reserving the right to retain ten per cent for his own security, and before the building was completed paid the contract price in full, such owner was not liable for work performed by an employee of such contractor, begun and completed nearly two months after such payment in full. Once having paid for it, he was discharged from payment a second time. An owner may pay in advance for work to be done for him, or he may waive a provision in his contract intended for his benefit and protection. An owner of property erecting houses or making permanent improvements need not ascertain how many employees the contractor may have, and how much money he may owe them, before he can venture to discharge his own obligations. To prevent this, the sub-contractor or employee must himself conform to the provisions of the statute.<sup>4</sup> Again, under an act "that every building, for the construction or repair of which any person shall have furnished materials or rendered services, shall be subject to the payment of the claim for such services and materials, such liens not to exceed in the whole the amount to be paid by the proprietor to the original contractor," where, by the contract, the proprietor was to pay a certain sum of money to the contractor after the building should be completed, and he paid it in good faith before

<sup>1</sup> Lynch v. Cashman, 3 E. D. Smith, 660; Thompson v. Yates, 28 How. Pr. (N. Y.) 142; Smith v. Coe, 2 Hilt. (N. Y.) 365

<sup>2</sup> Schneider v. Hobein, 41 How. Pr. (N. Y.) 232.

<sup>3</sup> Id.

<sup>4</sup> Prescott v. Maxwell, 48 Ill. 82.

the completion, leaving nothing more to be paid to the contractor, he could not be compelled to pay any part of it again for work or materials procured by the contractor after such payment.<sup>1</sup>

§ 292. **Set-offs, etc., as against Sub-contractors, etc.** — It seems that a payment made before a lien law took effect, though made before it became due, and a set-off then existing, and damages for the default of the contractor, claimed by way of recoupment, are available to the owner as a defence.<sup>2</sup> And where, in pursuance of a mutual understanding, the contractor, instead of receiving payment on the contract in cash, had been credited by the owner with the amount of a debt due by the contractor to the owner, in a proceeding by a claimant under the lien law, such crediting was equivalent to a payment, and that having been made in good faith before the notice of claim was filed, it *pro tanto* discharged the owner from liability.<sup>3</sup> But in all these cases, if there be any design to evade the statute, and defraud the laborer or material-man of its benefits, these settlements will not avail the owner as a defence.<sup>4</sup> Under the civil law of Louisiana, the owner of a building, being evicted under a contract, has no right to pay the contractor, in anticipation of the terms stipulated in the contract; and if he do so, he renders himself liable to the claims of material-men, etc., who have given him the requisite notice before the time expired.<sup>5</sup> And, generally, payments made in anticipation to contractors are considered as not made, so far as the rights of workmen and furnishers of materials are concerned.<sup>6</sup> And where it would seem from a receipt that the owner of a building had paid his contractor for repairs in anticipation of the time when due, the burden of proof is on him, when sued by a furnisher of materials on an attested account, to show that at the time of the service of the attested account upon him he had not really paid in anticipation, and that he did not then owe the contractor.<sup>7</sup>

§ 293. **Payments after Notice.** — Voluntary payments made by the owner to the contractor, after a sub-contractor has filed his notice of lien, can in no wise affect or impair the rights of the latter.<sup>8</sup> The sub-contractor's right attaches from the time of

<sup>1</sup> Spaulding v. Thompson, Ecc. Soc. 27 Conn. 573.

<sup>2</sup> Miller v. Moore, 1 E. D. Smith, 739.

<sup>3</sup> Allen v. Carman, Id. 692.

<sup>4</sup> Lynch v. Cashman, 3 E. D. Smith, 660; Haswell v. Goodchild, 12 Wend. (N. Y.) 373; Schneider v. Hobein, 41 How. Pr. (N. Y.) 232.

<sup>5</sup> Jorda v. Gobet, 5 La. An. (1850) 431; Baldwin v. Wood, 11 La. o. s. 453.

<sup>6</sup> Foucher v. Day, 6 La. o. s. 60; Civil Code, art. 2745.

<sup>7</sup> Offutt v. Scribner, 10 La. o. s. 639.

<sup>8</sup> Schneider v. Hobein, 41 How. Pr. (N. Y.) 232.

the notice, and, when it is duly given, the parties affected are bound to acquaint themselves with it at their peril. All such payments would be made in their own wrong.<sup>1</sup> But where a contractor is to be paid after his work is performed, the owner may, when the job is completed, safely discharge his obligation to the contractor, if he finds no person has given the notice required to create a lien, although the law provides that "within six months after the performance of such labor . . . the subcontractor . . . may serve a notice," etc. A contract to pay for a building when it is completed is certainly a lawful contract; but if the owner may be exposed to liens, created at any time within six months after its completion, he will be compelled to part with his money, or be subjected to an action at a time when he cannot safely pay, without subjecting himself to the hazard of being obliged to pay a second time, if it shall subsequently appear that the contractor has incurred debts to others for materials to finish the work. On the other hand, there is no hardship in requiring the party furnishing materials to act promptly in giving his notice, if he be not willing to trust the contractor.<sup>2</sup> In Louisiana, also, where the owner of a building pays the contractor, after having received notice of the claim of one of the workmen employed in the construction of the building, he is still liable to the workman.<sup>3</sup>

§ 294. **Burden of Proof of Payment.** — When work is done under a contract, and all the days of payment past, it throws the *onus* of proving actual payment on the employer. So, after a sub-contractor, in an action to enforce a lien, has proved his account, and a substantial performance of the contractor's agreement with the owner, this *prima facie* shows moneys due the contractor, out of which the plaintiff is entitled to be paid; to rebut it, the *onus* is on the defendant.<sup>4</sup> The presumption of the law is, in the absence of proof to the contrary, that payment is to be made on performance of work or delivery of materials.<sup>5</sup> When payment is pleaded by the owner, it should be by direct averment, and not inferentially.<sup>6</sup>

<sup>1</sup> Blauvelt v. Woodworth, 31 N. Y. 285.

<sup>2</sup> Carman v. McInerow, 2 E. D. Smith, 689; s. c. 13 N. Y. 70.

<sup>3</sup> McBurney v. Bradbury, 6 La. An. 39.

<sup>4</sup> Rudd v. Davis, 1 Hill (N. Y.), 277.

<sup>5</sup> Brady v. Anderson, 24 Ill. 110; Claycomb v. Cecil, 27 Ill. 497.

<sup>6</sup> Harbeck v. Southwell, 18 Wis. 418.

## CHAPTER XXVI.

## DISCHARGE OR PREVENTION OF LIEN.

§ 295. **When Voluntary Act of Parties.**<sup>1</sup> — The discharge of the mechanics' lien may be effected either by the direct act of the lienor done with that intent, or the performance or omission on his part of such things as in law operate as a discharge, or by the lienee under certain conditions prescribed by statute. The lien is a privilege for the exclusive benefit of the mechanic or material-man, and as such is at every stage of its existence under his complete control, and may at any time be discharged by such acts on his part as evidence such intention. An order to the proper officer to enter a discharge of the lien will have such an effect. This intention should be clear, and the act of discharge complete. Thus, where a *scire facias* was brought by a sub-contractor, and the owner filed an affidavit that a release of himself had been executed and delivered to the contractor, under agreement between the owner and contractor, and at the request of the contractor, and that, after the exhibition to the owner, the name of the claimant was struck off without the owner's knowledge, the affidavit was decided to be defective in not averring a delivery to, or to the use of, the owner.<sup>2</sup> A dismissal of proceedings to enforce the lien is not to be confounded with its discharge or abandonment. In the former case, it will be hereafter seen, if the time has not expired in which to commence proceedings, new steps may be taken to perfect it, as in other cases of discontinuance or nonsuit. But a discharge of the lien for a valuable consideration,<sup>3</sup> or on the faith of which abandonment parties have acted, cannot, in the absence of fraud or mistake, be avoided. The effect of the discharge is to destroy all recourse of the lienor against the particular property under the lien law. A discharge of the lien is not necessarily a discharge of the debt, or of the right of personal action for its recovery. But the payment of the debt is a discharge of the

<sup>1</sup> [See §§ 62, 62 *f*, contract preventing lien; see in Index, RECORDING, BOND, DISCHARGE.]

<sup>2</sup> *Wetherill v. Harbert*, 2 Penn. St. 348.

<sup>3</sup> *Kennedy v. Jones*, 76 Me. 538.

lien.<sup>1</sup> In those States where the owner is not personally responsible to sub-contractors or material-men, the proceeding to foreclose, so far as he is concerned, is at an end when the lien is discharged, and the proceedings should therefore be dismissed as to him. But, as between the lienor and the contractor, who is personally liable to him, the ceasing of the lien does not affect the proceedings if the court has jurisdiction to try the issues joined; and the judgment claimed by the lienor depends not upon the lien, but on the merits of the claim upon which it was founded. Judgment in such cases will have all the efficacy as if rendered in a common-law proceeding.<sup>2</sup> Various acts on the part of lien claimants also have the effect to discharge the lien. These will be found generally to be either inconsistent with its further existence, or render its further prosecution an injustice to others. Thus, the sale of property charged to the lienor is an extinguishment of the lien.<sup>3</sup> So will such fraud on his part as in ordinary personal actions would prevent any recovery of the debt, or such conduct as in equity should estop him from its assertion. Payment to one of several joint contractors will be good, and any one may enter satisfaction in behalf of all.<sup>4</sup> But a debtor cannot by any act of his own discharge a lien attached against his property. Thus, a contractor cannot defeat lien of sub-contractor by making an assignment for the benefit of his creditor. The latter is entitled to proceed the same as if it had not been made.<sup>5</sup> So, an assignment for the benefit of creditors does not prevent the filing of a mechanics' lien.<sup>6</sup> And the mechanic does not lose his lien by proving his debt against the assignee, and taking a dividend.<sup>7</sup> Nor will the cancellation of a contract affect liens already attached.<sup>8</sup> A lien on the interest of a purchaser in possession is not divested by cancellation of his contracts in a suit to which the lienor is not a party.<sup>9</sup> A statute lien which has attached to property in the hands of the vendee is not defeated by a subsequent rescission of the contract of sale by the vendor, nor by a writ and judgment in replevin for the same property, in favor of the vendor.<sup>10</sup> A conveyance of the title to land to a stranger after contracts for the erection of a house thereon are made, and the building com-

<sup>1</sup> *Kennedy v. Jones*, 67 Me. 538.

<sup>2</sup> *Schacttler v. Gardiner*, 41 How. Pr. (N. Y.) 243.

<sup>3</sup> *Foltz v. Peters*, 16 Ind. 244.

<sup>4</sup> *Eagle v. Keyser*, 17 Abb. Pr. (N. Y.) 214.

<sup>5</sup> *McMurray v. Hutcheson*, 59 How.

Pr. (N. Y.) 210; s. c. 8 Abb. N. Cas. (N. Y.) 423.

<sup>6</sup> *Crump v. Gill*, 9 Phila. 117.

<sup>7</sup> [*Paddock v. Stout*, 121 Ill. 572.]

<sup>8</sup> *Jenks v. Brown*, 66 N. Y. 629.

<sup>9</sup> [*King v. Smith*, 42 Minn. 286.]

<sup>10</sup> [*Calef v. Brinley*, & *Stevens v. Kenard*, 58 N. H. 90.]

menced, will not defeat a lien for materials furnished in good faith at the request of the apparent owner, and which actually went into the construction of the building.<sup>1</sup> Where, at the date of the first charge for materials furnished for building a house, the defendant was in possession of the land under a contract of purchase, and had paid therefor in full, it was held that the lien was not defeated by his subsequently procuring a conveyance to be made to his sister instead of to himself.<sup>2</sup> One who had acquired an equitable estate in land, by articles of agreement, and the payment of part of the purchase-money and possession taken, had a dwelling erected thereon, and subsequently, without a reconveyance, "threw up" the contract with the vendor. Afterward, the wife of the vendee procured from the vendor an agreement for the sale of the lot to her, upon which agreement she made certain payments of purchase-money, and was allowed a credit for what had previously been paid by her husband. In such case, the lien of a mechanics' claim, for work done and materials furnished in the erection of the dwelling, was not divested. The husband could not convey his title directly to his wife so as to defeat the lien; much less could he do so indirectly. This may be appropriately termed a new way to get a house without paying for it. If we concede that a lien filed against an equitable estate falls with the destruction of said estate, either by a judicial proceeding, or by a merger of the equitable and legal titles, yet the law will not recognize such a summary mode of getting rid of the equitable title. The title to real estate cannot be tossed about from hand to hand like a base ball.<sup>3</sup> A fraudulent and sham sale of church property to one of the trustees will not defeat the lien of the builder.<sup>4</sup> In order to obtain the release of property from the lien of a mechanics' claim by the substitution of a bond and judgment against other property, as provided by the Acts of August 1, 1868, and March 6, 1873, it is not necessary that all of the defendants in the claim should join in the bond.<sup>5</sup> To defeat a sub-contractor's lien by bond and notice of it, the notice must be kept conspicuously posted about the premises during the performance of the labor, and at the time of furnishing the material.<sup>6</sup> A release executed by mechanics or material-men, during the progress of the construction of a building, of all manner of liens,

<sup>1</sup> [Hewett v. Currier, 63 Wis. 386.]<sup>2</sup> [Crocker v. Currier, 65 Tex. 662.]<sup>3</sup> [Wingert v. Stone, 142 Penn. 253, 262.]<sup>4</sup> [Jones v. Trustees, 30 La. An. 711, 713.]<sup>5</sup> [Leiper v. Hay, 19 Phil. 362.]<sup>6</sup> [Kraus v. Murphy, 38 Minn. 423.]

etc., "which we or any or either of us now have or might or could have on or against the said building," is an unconditional agreement to look to the personal responsibility of the owner or contractor, and not to the structure. Such a release, though made during the progress of the work, is operative to discharge the building from mechanics' liens as effectively as though made after its completion, and for labor done and material furnished after as well as before its execution.<sup>1</sup> A release is not effective unless the terms upon which it is conditioned are complied with.<sup>2</sup> If a release of lien is given for a special purpose, as to give a mortgage priority, its effect will be confined to the intended purpose.<sup>3</sup> A laborer who quits for good cause before his time is up, does not lose his lien for work already done.<sup>4</sup> But a contractor who refuses to complete the work merely for fear he will not be paid, forfeits his lien for the work he has done, and can have only a *quantum meruit*.<sup>5</sup> The owner may pay into court the amount claimed to be due the contractor, and ask that other lienors be substituted for him as defendants, and the mere fact that other sub contractors notified the owner that they were furnishing materials, and would hold him responsible, will not prevent the owner's discharge.<sup>6</sup> An owner of property affected by a lien, may, in writing, offer to pay into court an amount to be stated "in discharge of a lien." But such an offer which fails to state that it is made "in discharge of the lien," is ineffectual to defeat the right of the lienor to further costs.<sup>7</sup> An owner who pays the money into court has a right to an interpleader.<sup>8</sup> An agreement to arbitrate will not affect the right to bring suit on the lien.<sup>9</sup> One entitled to a mechanics' lien may enforce it, though the debtor has made an assignment for the benefit of his creditors, and though the creditor has not presented his claim against the estate of the insolvent.<sup>10</sup>

§ 295 a. **The Prevention or Discharge of Lien by Bond or Recording Contract.** — In New Jersey liens may be prevented by recording the building contract. The filing of a contract, however, precludes liens only "for work done and materials furnished in pursuance of such contract." If the owner of the building chooses to abrogate the whole or part of the contract

<sup>1</sup> [Brown v. Williams, 120 Penn. 24.]

<sup>2</sup> [Albrecht v. The C. C. F. L. Co., 126 Ind. 318.]

<sup>3</sup> [Paulsen v. Manske, 126 Ill. 73; 23 Ill. App. 95.]

<sup>4</sup> [Hart v. Hirsch, 74 Ga. 799.]

<sup>5</sup> [Rome Hotel Co. v. Warlick, 87 Ga. 34, 43.]

<sup>6</sup> [Wagner v. McMillen, 72 Wis. 327.]

<sup>7</sup> [Burton v. Rockwell, 63 Hun. 163.]

<sup>8</sup> [Hall v. Baldwin, 45 N. J. Eq. 858.]

<sup>9</sup> [Paulsen v. Manske, 126 Ill. 72, 80; 24 Ill. App. 95.]

<sup>10</sup> [Barnes v. Fisher, 9 Mo. App. 574.]



filed, and make another instead, or to enter into a further contract requiring additional work or materials, he places himself outside of the protection of the statute to the extent of the changes made. Many building contracts authorize the owner, without consent of the builder, to require alterations and additions during the progress of the work. Labor and materials necessary to meet such changes are furnished in pursuance of the contract, and, if the contract were duly filed, no lien could be obtained therefor except by the original contractor. But if the work or materials be not furnished in pursuance of the contract filed, the exemption of the statute will not apply.<sup>1</sup> The filing of a contract for the erection of a building, made by the owner in the name of an agent merely, and not disclosing the owner's name, will not protect the buildings from liens under the Mechanics' Lien law. . . . The first section of the law gives a lien against every building to every person furnishing labor or materials for its construction. The second section enacts "that when any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone, for work done or materials furnished in pursuance of such contract; provided such contract or a duplicate thereof be filed in the office of the clerk of the county in which such building is situate, before such work done or materials furnished." "The manifest object of the proviso just recited is to notify all persons, other than the original contractor, who may be about to furnish materials or labor for the construction of the building, that they cannot rely upon a lien for payment. In order that the filing of the contract may accomplish this purpose of notice, there must be some means by which the parties to be notified can discover that the instrument has been so filed. No such means is expressly provided by law, and none can be suggested by inference from the law, which does not presuppose the ascertainment by those parties of some fact *in pais*. They must have learned some fact which shall form a clue to their search for the contract in question. The fact that in my judgment is most reasonably suggested by the law, is the name of the person about to have the building erected, its owner. . . . If there be on file no contract in his name, they may rely on a lien. Indeed, a writing not disclosing his name would not be, strictly speaking, what the statute requires to be filed, a contract in writing, for if the writing does not indicate the

<sup>1</sup> [Willetts & Co. v. Earl, 53 N. J. L. 270, 274.]

parties, it does not show the essentials of the contract.”<sup>1</sup> When a building contract has been duly filed under the Mechanics' Lien law, a person furnishing labor or materials to the builder will not acquire a right to a lien by reason of the subsequent abandonment of that contract . . . The lien is merely statutory, and the statute provides for no lien, except such as arises by the furnishing of labor or materials. If the right to a lien does not come into existence when the materials or labor is completely furnished, it never does. If a person has done his work, or sold or delivered his property without any expectation of having a lien thereof, the subsequent conduct of other parties constitutes no reason for securing him a lien.<sup>2</sup> The execution of a proper bond by the contractor prevents any lien on the part of sub-contractors.<sup>3</sup> In Illinois, if the contractor gives a bond to pay for all work and materials for which a lien might accrue, sub-contractors will have no lien. This bond may be filed even after a sub-contractor has brought suit to enforce his lien. In that case the court will determine the amount due the plaintiff, but no lien can be decreed.<sup>4</sup> Where the principal contractor for the erection of a building has stipulated that upon its completion the building shall be delivered to the owner “free of all liens and encumbrances,” a mechanics' lien cannot be filed by a sub-contractor for work done or materials furnished by him toward the erection of the building. The only connection between the owner and the sub-contractor being through and by means of the contract between the owner and the principal contractor, the sub-contractor is chargeable with notice of all its terms and stipulations, and is bound thereby; he cannot have the benefits of the builder's contract without accepting its conditions.<sup>5</sup> But an agreement by the contractor to furnish the owner before the last payment shall be due with “releases from all persons having a right of lien,” does not prevent the filing of a lien by a sub-contractor.<sup>6</sup>

§ 296. **When Lien is discharged by uniting with it Non-lien Claims.**<sup>7</sup>—A party seeking a peculiar right or remedy, in respect to a particular debt, must enforce it by itself, and not unite it with other claims. Any other rule would be highly unjust and

<sup>1</sup> [Willetts & Co. v. Earl, 53 N. J. L., 270, 272, 273.]

<sup>2</sup> [Willetts & Co. v. Earl, 53 N. J. L., 270, 274.]

<sup>3</sup> [Bohn v. M'Carthy, 29 Minn. 23.]

<sup>4</sup> [Martin v. Swift, 120 Ill. 488; Swift v. Martin, 20 Bradw. 515.]

<sup>5</sup> [Schroeder v. Galland, 134 Penn. 277; Benedict v. Hood, 134 Penn. 289.]

<sup>6</sup> [Murphy v. Morton, 139 Penn. 345.]

<sup>7</sup> [See § 355.]

oppressive.<sup>1</sup> This is illustrated by a series of decisions in several of the States. Thus, it was held that the lien was lost if the creditor, in taking his judgment, include any non-lien claims;<sup>2</sup> as including labor and materials for painting a fence and varnishing carpets, which are not lienable, with those which are.<sup>3</sup> When the contract is for an entire sum to be paid for various services, some of which are not lienable, no lien can be maintained for any of the work.<sup>4</sup> Where a laborer has so intermingled his lien claim with non-lien items, that the exact amount for which he is entitled to a lien cannot be ascertained, the whole lien must fail.<sup>5</sup> For otherwise a person having an account due for labor or materials furnished, payment of which would be secured by a lien, could combine with it other claims not thus secured and obtain judgment for the whole amount, and enforce the collection of that judgment, by taking the estate subjected to the lien, the effect of which might be, where the material-man or sub-contractor has a lien, that he could collect a debt due only from the contractor from the estate of another not subject to a lien for this part;<sup>6</sup> or other lien claimants who have a common right against the property might be defrauded in the same way. Under a statute which gave a lien for the performance of labor or furnishing of materials actually used, "by virtue of any agreement with or consent of the owner thereof," etc., "provided that no lien for materials furnished shall attach unless the person furnishing the same shall, before so doing, give notice to the owner of the land, if such owner be not the purchaser of the materials, that he intends to claim such lien;" if labor and materials have been furnished by a sub-contractor, and used in the erection of a building under an entire contract, with no stipulation for any separate price for either, and it was impossible to determine what part of the contract price was to be applied to either, and there was no mechanics' lien for the whole, for want of notice to the owner, — it was held there could be no lien for any part.<sup>7</sup> So, if labor and materials have been furnished and used in the erection of a building, and a payment

<sup>1</sup> *Hickox v. Fay*, 36 Barb. (N. Y.) 9; *Truesdell v. Gay*, 13 Gray (Mass.), 311.

<sup>2</sup> *Johnson v. Pike*, 35 Me. 291; *McCullis v. Wilson*, 4 Redington (Me.), 286; *Bicknell v. Trickey*, 4 Id. 273; *Lambard v. Pike*, 33 Me. 141.

<sup>3</sup> *First Nat. Bank of Salem v. Redman*, 57 Me. 405.

<sup>4</sup> [*Adler v. World's Pastime Exposition Co.*, 126 Ill. 373, 377.]

<sup>5</sup> *Baker v. Fessenden*, 71 Me. 292.

<sup>6</sup> *Lambard v. Pike*, 33 Me. 141.

<sup>7</sup> *Morrison v. Minot*, 5 Allen (Mass.), 403; *Graves v. Bemis*, 8 Allen (Mass.), 573; *Mulrey v. Barrow*, 11 Allen (Mass.), 152; *Felton v. Minot*, 7 Allen (Mass.), 412, affirmed in *Whitney v. Joslin*, 108 Mass. 103.

has been made on general account, without discrimination as to whether the same should be applied towards the price of the labor or the price of the materials, so that it is impossible to determine how much remains due for the labor or for the materials separately, and there is no mechanics' lien for the whole, there can be none for any part.<sup>1</sup> There may also be a discharge *pro tanto* by a mechanic bringing suit upon his claim, and withdrawing one item of the claim on the trial. He cannot in such case afterwards bring a separate suit for the same item. The former recovery is a bar to the second action, as the claim was entire and not capable of severance.<sup>2</sup>

§ 297. **Discharge by failing to comply with Statute.**<sup>3</sup> — The most frequent source from which the discharge of the lien arises against the will of the claimant is the omission on his part to comply with all the substantive requirements of the act creating the lien. The lien being the creation of statute, and proceedings to enforce it unknown either at law or in equity;<sup>4</sup> it follows that any act required to be done, and which is made a condition precedent to its enforcement, is fatal, unless strictly performed. Numerous instances of such defects in the proceedings that have been decided by the courts to have been fatal will be found under their appropriate chapters in the subsequent part of this treatise relating to remedies. It will be there observed that at every stage of the proceeding compliance with statutory directions is essential; for, independently of statute, no equitable principles exist which can come to the aid of the mechanic. It has been universally held that he must seek his lien under the statute giving the right, and subject to its conditions, or not at all. When, however, a claimant has done all the law requires at his hand, and a public officer fails in the performance of his part of the duty, the lien is not ordinarily affected, unless the words of the statute require a different construction. Illustrating this principle is the case of an error of a register in improperly indorsing a mortgage, whereby a subsequent purchaser was misled; and as it was the duty of the register to make such indorsement, and its omission was not the fault of the mortgagee, it could not affect his rights or invalidate the mortgage. The party injured had a right of action against the register.<sup>5</sup> So, where a notice of the lien was left for record in the time speci-

<sup>1</sup> Driscoll v. Hill, 11 Allen (Mass.), 154.

<sup>2</sup> Smedley v. Tucker, 3 Phila. 259.

<sup>3</sup> [This section approved in 87 Ala. 465.]

<sup>4</sup> McNiel v. Borland, 23 Cal. 144.

<sup>5</sup> Dikeman v. Puckhafer, 1 Daly (N. Y.), 489.

fied, a transfer of the property, before the notice was filed, could not defeat the lien which had already accrued upon the premises.<sup>1</sup> So a mechanics' lien, regularly filed in proper form and time, and properly entered in the lien docket, was valid as between the parties to it, though the prothonotary omitted to index their names alphabetically in that docket, which was required by statute.<sup>2</sup> A lien claim was entitled to priority over a mortgage, but, owing to the carelessness of the county clerk in making up the record, the judgment on the lien-claim was entered as a general judgment, and hence the master, on the foreclosure of the mortgage, reported that the mortgage was a prior encumbrance. The mistake was not discovered by the holder of the judgment until after the sale on the foreclosure. The property was bought by the mortgagee. It was held, that the priority of the judgment could be established, and that complainant had not forfeited his right to redress through laches, the delay having been caused by his endeavor to obtain his just demand without resort to litigation.<sup>3</sup> Where it was argued that a lien was lost by there not being an affidavit attached to the execution, and it appeared in evidence that it had originally been attached, but was "lost off or worn off," it was held that the mechanic did not in such case lose his priority of lien; though the affidavit was a necessity.<sup>4</sup> And where a clerk negligently performed his duty in making a defective certificate, which was a matter of form, the claimant not being injured, the clerk was allowed to amend it.<sup>5</sup> The failure of a county clerk to indorse upon the lien claim the time of issuing the summons, as provided by statute, does not avoid the writ, when neither the defendant or third parties can be injured by the failure to indorse;<sup>6</sup> or in cases between concurrent lien claimants.<sup>7</sup> Where the law provides for discharge of the lien unless action is brought within a time named, and an affidavit of service of notice, etc., filed with the clerk of court, a failure to file said affidavit will justify cancellation of the lien, although the action was really begun, and was stayed by the court to await the decision of another suit. Such facts were no excuse for failing to file notice of the legal steps taken as the statute requires.<sup>8</sup>

§ 298. **Death of either Party no Discharge of Lien.** — The death of either the contractor or owner will not work a forfeiture or

<sup>1</sup> *Hotelling v. Cronise*, 2 Cal. 60.

<sup>2</sup> *Irish v. Harvey*, 44 Penn. St. 76.

<sup>3</sup> *Kline v. Cutter*, 34 N. J. Eq. 329.

<sup>4</sup> *Yarborough v. Lumpkin*, 52 Ga.

283.

<sup>5</sup> *Laswell v. Presbyterian Church*, 46 Mo. 279.

<sup>6</sup> *James v. Van Horn*, 39 N. J. L. 353.

<sup>7</sup> *Hall v. Spaulding*, 40 N. J. L. 166.

<sup>8</sup> [*Prior v. White*, 32 Hun, 14.]

discharge of the lien, unless some special provision of law requires such construction. With regard to the effect of the death of the contractor, it has been insisted that the lien law, being a special statute, is to be strictly construed; that it contemplates the existence of contracting parties, and that the death of the contractor, in effect, repeals or abrogates the statute, and deprives the laborer or material-man of his lien; that upon the death of the contractor his assets pass to the executor or administrator, and that the intervention of the lien cannot deprive his legal representatives of their power over his estate. The answer to this argument is, in those States where a sub-contractor may proceed against the owner for the funds in his hands belonging to the contractor, that the primary object of the legislature was to create, in favor of the laborer and material-man, a lien upon the fund in the owner's hands due to the contractor; and as to that fund to give him priority over every general creditor of the contractor, imposing only as a condition that within the time prescribed therefor he should file and serve the notice required by the statute. When that condition is performed, the lienor's right becomes absolute, and is not destroyed or affected by the death of the contractor.<sup>1</sup> When lien is acquired, the death of the owner does not destroy it.<sup>2</sup> So, where in none of the steps to perfect a lien is the personal act or participation of the owner required, and the terms of the law are strictly complied with, neither principles nor a fair construction of such a law require that the owner should survive the taking the proper measures to secure the lien, and, as a consequence, the death of the owner of the property will not defeat a lien which would otherwise be available.<sup>3</sup> Again, where it was provided that "such lien is not to attach unless the contract is made in writing, and signed by the owner of the land . . . and recorded in the registry of deeds for the county where the land lies," and "if the person indebted in any such contract shall die, or shall convey away his estate, before the commencement of a suit on the contract, the suit may be commenced and prosecuted against his heirs, or whoever shall hold his estate," etc., it is manifest that the legislature intended that the death of neither of the contracting parties should impair or dissolve the statute lien, and as no time is limited within which the contract is required to be recorded,

<sup>1</sup> Telfer v. Kierstead, 2 Hilt. (N. Y.) 577; s. c. 9 Abb. Pr. (N. Y.) 418.

<sup>2</sup> Brown v. Zeiss, 59 How. Pr. (N. Y.) 345.

<sup>3</sup> Williams v. Webb, 2 Disney (Cin.) 430.

no reason can be given why the death of the owner should prevent the lien from attaching. The estate at his death would descend to his heirs; but they would hold it subject to the claims of creditors.<sup>1</sup> But it has been held that, where the law requires the notice to be filed, and gives a lien "to the extent of the right, title, and interest of the owner at the time of the filing the lien," and the owner died before the notice was filed, if no lien has been created prior to the death of the owner and the title has passed to another, whether by purchase, devise, or otherwise, no lien can be acquired against such subsequent owner, by proceedings founded on claims arising under a contract with the deceased owner.<sup>2</sup> In a later case, where the lien is given only "to the extent of the right, title, and interest then existing of the owner," labor done on premises in pursuance of a contract with a prior owner cannot be the subject of lien as against a succeeding owner, unless the lien was fixed before the transfer.<sup>3</sup> So where the lien created attaches to the extent of the interest of the owner, and does not create a personal claim against such owner, no action, therefore, can be maintained against the executors for a personal demand arising thereon. There may be cases under the above law where such a proceeding can be instituted against executors, such, for instance, as that of a devise by the testator of his real estate to his executors; but without title to the property of the testator on which the lien exists no such proceeding can be maintained against the executors of the deceased owner.<sup>4</sup> A proceeding to foreclose a mechanics' lien under chap. 500, Laws of 1863, New York, is not an action within section 121 of the Code; and the proceeding abates upon the death of the owner, and cannot be revived against his devisees or representatives.<sup>5</sup> If a person be entitled to a lien on a house and land, and by an insolvent act provision is made for the disposition of the whole of an insolvent estate, and no part of it is appropriated to the claims secured by lien, and no provision is made by statute authorizing the recovery of a judgment against an estate actually insolvent, the lienor is not entitled to a preference over the general creditors, when the debtor has deceased and his estate has been rendered insolvent within one year from the time of granting administration.<sup>6</sup> But an action commenced

<sup>1</sup> Foster, Petitioner, 20 Pick. 542; Pifer v. Ward, 8 Blackf. (Ind.) 252.

<sup>2</sup> Crystal v. Flannelly, 2 E. D. Smith, 583.

<sup>3</sup> Meyers v. Bennett, 7 Daly (N. Y.), 471.

<sup>4</sup> Crystal v. Flannelly, 2 E. D. Smith, 583.

<sup>5</sup> Leavy v. Gardner, 63 N. Y. 624.

<sup>6</sup> Severance v. Hammatt, 28 Me. 511.

before the expiration of a lien, and brought to enforce it, may be prosecuted to judgment and execution against an administrator or executor, notwithstanding the death and insolvency of the debtor. So, in case of a defendant under guardianship by reason of insanity, whose estate has been duly represented insolvent.<sup>1</sup> The lien of one furnishing materials to a lessee is not affected by a subsequent assignment by him for the benefit of creditors.<sup>2</sup>

§ 299. **Discharge by Bankruptcy.** — Before passing to consider how far mechanics' liens are affected by the bankruptcy of the owner, it is well to note that the security of lien given to mechanics and material-men is not obnoxious to the letter, spirit, or policy of the bankrupt act, because it works no injustice to any creditor. It should be remarked, in one respect there is an important difference between mechanics' lien for labor and materials and a lien created by attachment. In the latter case, an attaching creditor has no claim for preference over other creditors, except by his attachment; whereas when a mechanic obtains a lien under the statute, and, relying upon it, increases the value of the land by erecting buildings thereon, he has a strong equitable claim for reimbursement to the extent of the value of his labor and materials furnished for building, and in this respect he has a marked preference over the other creditors of the land, who had trusted to the personal credit of their debtor.<sup>3</sup> The lien is given to secure the claims of certain persons for the value of their labor and materials bestowed upon the property of the debtor. The operation of the law is a convenient substitute for the giving of a mortgage, or other express security, day by day, for the value of such work and materials and is to be considered and enforced as such. Upon the faith of this security, so given, the one party furnishes labor and material, and the other secures the benefit of them. This transaction is not in violation of the terms or policy of the bankrupt act, even although the owner of the property should be insolvent at the time; because such security or lien is only equivalent to the additional value which the creditor has by this means given to the property of the debtor, and therefore does not diminish the assets of the latter applicable to the payment of his pre-existing debts; like advances made in good faith to an indebted person, to enable him to carry on his business, upon security

<sup>1</sup> Pratt v. Seavey, 41 Me. 370.

<sup>3</sup> Foster v. Heirs of Stone, 20 Pick.

<sup>2</sup> [Hart v. Globe Iron Works, 37 Ohio 540.  
St. 75, 77.]



taken at the time, which do not violate either the terms or policy of the bankrupt act, since the debtor gets a present equivalent for the new debt he creates and the security he gives. Accordingly, if the law secure the lien to the mechanic or material-man from the doing of the work or the furnishing the materials, and it attaches to the building from that time, upon the condition subsequent that the lien creditor file a notice of his intention to hold such lien within a certain period from the completion of the building, the commencement of proceedings in bankruptcy between the doing of the work or furnishing of materials and the filing of such notice does not impair or affect the lien or the right of the lien creditor to continue it by filing the notice. The lien existed under the mechanics' act prior to the commencement of proceedings, and the right under such circumstances is preserved by the bankrupt law.<sup>1</sup>

§ 300. **Effect of Bankruptcy.** — The same view was expressed in another State,<sup>2</sup> under a law which created a lien as soon as the labor was performed or the materials furnished and used, but declared that it should be dissolved unless the creditor should file a certificate thereof in the city clerk's office within thirty days, and begin a suit to enforce it within ninety days after he ceased to furnish the labor or materials. It was decided that the certificate might be filed and the suit commenced after the commencement of proceedings in bankruptcy. These steps were necessary to keep the lien alive, and could not be deemed encroachments upon the authority of the bankrupt court. But no sale could be made during the pendency of the proceedings in bankruptcy, and the State court should order the suit to stand continued, to await the result of the action of the bankrupt court.<sup>3</sup> Again, in Pennsylvania, where the lien by the State law commences, at least when the materials are furnished, and materials were furnished to a party, and afterwards a petition in bankruptcy was filed against him, then a claim of lien for the materials in due time, and then he was adjudged a bankrupt; under such circumstances the premises passed to the assignee, subject to the lien, which was, however, to be enforced in a State court, and not in the United States court.<sup>4</sup> But a lien, to be recognized by the bankrupt court as a valid lien on property which passes from the bankrupt to the assignee, by virtue of the proceedings in bankruptcy, must be a lien at the time of the

<sup>1</sup> *In re Coulter*, 5 Nat. Bank. Reg. 64.

<sup>2</sup> Massachusetts.

<sup>3</sup> *Clifton v. Foster*, 3 Nat. Bank. Reg. 162; s. c. 4 Am. Rep. 539.

<sup>4</sup> *Keller v. Denmead*, 68 Penn. 449.

commencement of the proceedings in bankruptcy. No proceeding thereafter, under a State law, to impose upon it a lien not then created or constituted, is valid. So that where it is not the intention of such a law,<sup>1</sup> that the performing of the labor or the furnishing of the materials shall of itself constitute a lien for the debt upon the building or land, and the creating of the debt by such means only gives a right to the creditor to create the lien by filing the claim within the time and in the manner specified, lien claims which were filed after the commencement of proceedings in bankruptcy did not become, by such filing, liens which must be allowed by the bankrupt court, although they were filed within the time granted by the statute.<sup>2</sup> So no claim can be allowed for work done after the filing of the petition in bankruptcy.<sup>3</sup> In a Georgia case the court said that during mesne process bankruptcy discharges a lien, and where there is a foreclosure and execution and a counter affidavit is interposed and returned for trial the process is mesne.<sup>4</sup> Under the twenty-seventh section of the bankrupt act,<sup>5</sup> mechanics' liens for wages, to the amount of fifty dollars, and due within six months before bankruptcy, are entitled to priority, and may be assigned, and the privilege enforced by their assignee.<sup>6</sup>

§ 300 *a*. **Proceedings in Case of Bankruptcy.** — It was not intended by the late United States Bankrupt Law to cut off or destroy liens or vested rights acquired under State laws, but rather to preserve all liens, and a person has therefore a right, notwithstanding the commencement of proceedings in bankruptcy, to perform all acts necessary to the final prosecution and perfection of his lien under the statutes of the State, and the courts of the State whose statute gives the lien would have jurisdiction to ascertain and enforce the lien against the property, when the bankrupt court orders the property to be sold subject to the lien.<sup>7</sup> Although the lien is created by statute, it will be lost by an omission of the steps required for its enforcement. And therefore, notwithstanding proceedings in bankruptcy against an owner, the petition to enforce the lien should not be dismissed in the State court, where it is uncertain whether the bankruptcy court would enforce such a claim unless it be kept alive by proceedings contemplated by statute.<sup>8</sup> When a creditor

<sup>1</sup> New Jersey.

<sup>2</sup> *In re Dey*, 3 Nat. Bank. Reg. 81 ;  
s. c. 9 Blatchf. 285.

<sup>3</sup> *In re Cook & Gleason*, 3 Chic. Leg. N. 388.  
410.

<sup>4</sup> [*Cosgrave v. Mitchell*, 74 Ga. 824.]

<sup>5</sup> 1867.

<sup>6</sup> *In re Brown*, 3 Nat. Bank. Reg. 177.

<sup>7</sup> *Douglas v. St. Louis Zinc Co.*, 56 Mo.

<sup>8</sup> *Bryant v. Small*, 35 Wis. 205.

has a lien on a building, or on the land whereon the building stands, and the debtor is adjudged a bankrupt, unless his assignee shall proceed in the United States courts sitting in bankruptcy to ascertain the lien and provide for its satisfaction out of the property, the creditor will be entitled to enforce his lien by suit in the State court.<sup>1</sup> In another case it was held that where parties had invoked the equitable jurisdiction of the court for the foreclosure of the lien, it might restrain the same parties from continuing bankrupt proceedings against the owner for the enforcement of their claim.<sup>2</sup> Where a claimant failed to state in the probate of his lien claim before the register that it was secured by a mechanics' lien, as required by section 5077 of the Bankrupt Act, it was held that a third party not interested in the distribution could not make the complaint. Held, further, that the property covered by the lien occupied the place of a surety for the payment of the debt of the bankrupt, and there was no reason why the claimant should have set it forth in his proof.<sup>3</sup>

§ 301. **Dissolution of Partnership no Discharge.** — The dissolution of a partnership has no other effect upon contracts for building than upon those for other purposes. Exposed as partnerships are to sudden and arbitrary terminations arising from death, or the will and conduct of the partners themselves, engagements undertaken by the firm are frequently, at the moment of dissolution, in a condition of part performance either on the side of the partners or on that of the persons with whom they have dealt. For these purposes, — the collection of its assets and the enforcement of its rights, — the partnership continues in a qualified sense, although for all other purposes it may be fully dissolved. It follows, therefore, that as the rights of the partnership at the moment of dissolution remain intact, the lien is not discharged thereby. Accordingly it has been held that where a partnership had a lien for work and money expended upon machinery, it was not discharged by the dissolution of the firm and the assignment by one partner of his interest therein to the other on a settlement. The partner to whom the debt and lien were assigned might enforce the same for his own use in the name of the firm, under the general rule that a remaining partner takes all the rights of the firm and may exercise them in the name of the firm, for all purposes necessary for their

<sup>1</sup> *Marston v. Stickney*, 55 N. H. 383.

<sup>2</sup> *Bassett & Brown v. Baird*, 85 Penn.

<sup>3</sup> *Pusey v. Bradley*, 1 N. Y. Supreme Ct. 661.

enforcement and for closing up the joint business.<sup>1</sup> Changes in the contracting firm, the firm being at all times bound to fulfil the contract, do not defeat the lien.<sup>2</sup> When one of two partners engaged in the execution, as sub-contractors, of work upon a building, purchases the interest of his co-partner in the partnership property and assets, agreeing to pay the partnership debts, and thereafter continues the work, he is entitled to file a notice of lien against the land upon which the work is done.<sup>3</sup> A surviving partner may after his co-partner's death complete the delivery of materials for a building under a contract of the firm to deliver them; and the limitation on the lien claim runs from the date of the last delivery under the contract, and not from the date of the co-partner's death.<sup>4</sup> But a surviving partner cannot on the firm account continue to furnish materials on *running account*, and take a lien for the whole; and cannot add items thus furnished upon running accounts to the items furnished on special contract, so as to save the lien.<sup>5</sup>

§ 302. **Change of Sovereignty no Discharge.**—A mere change of sovereignty does not affect liens in existence.<sup>6</sup> Divisions of territory are entirely political. When a separation of jurisdiction takes place, private interests and private contracts remain undisturbed, and every individual relation continues the same, except that of being associated under the same government.<sup>7</sup> Thus, where a county by a new name was formed out of several old counties, in each of which the mechanics' lien law had been extended by name, the lien and its remedies continued in force in the new county. The argument against this conclusion was, that as the law was extended to the old counties by name, its operation was limited to the territory within the geographical limits of each of these counties for the time being, — that where these counties were, the lien was, and that when territory was taken out of these counties, it was taken out of the operation of the law. If this position were admitted, it would be necessary, when a new county was erected, to re-enact the whole body of statute laws; and the legislature could not change the name of any territory, whether school district, township, or county, without virtual repeal of all local laws. Territory or men, once

<sup>1</sup> *Busfield v. Wheeler*, 14 Allen (Mass.), 139.

<sup>2</sup> [*German Bk. v. Schloth*, 59 Iowa, 316, 321.]

<sup>3</sup> [*Ogden v. Alexander*, 63 Hun, 56.]

<sup>4</sup> [*Miller v. Hoffman*, 26 Mo. App. 199; *Miller v. Whitelaw*, 28 Mo. App. 639.]

<sup>5</sup> [*Miller v. Hoffman*, 26 Mo. App. 199.]

<sup>6</sup> *The Mutual Ass. Soc. v. Watts*, 1 Wheat. (U. S.) 279.

<sup>7</sup> *Korn v. Mutual Ass. Soc.*, 6 Cranch (U. S.), 199.

made the objects of legislation, remain subject to the laws imposed, however the names by which they are designated may be changed. The mechanics' lien law, operative on the spot where in this instance it was sought to be enforced, and unrepealed by the law creating the new county, remained operative, notwithstanding the change of the municipal name.<sup>1</sup>

§ 303. **Discharge by Order of Court, Lienee, etc.** — When the discharge of the lien is neither the act of the lienor nor a legal consequence thereof, but is a right of the party proceeded against to have the same dismissed, or the act of some judicial officer, the discharge can only be effected in one of the modes prescribed by the statute, as the whole proceeding is a special one, and such remedies only as are expressly given, can be pursued;<sup>2</sup> any others will be nullities. It has been thus expressed in other cases. The express provisions made in statutes for the discharge of liens in certain cases preclude any implication of a legislative intent that they may be discharged in other cases not mentioned. Thus, where a claimant was allowed less than the sum claimed by him, and appealed from the judgment; the owner, then, upon the refusal of the claimant to receive it, paid the amount of the judgment into court and applied to have the property released from the lien, it was held that as the judgment had been appealed from by the claimant and not by the owner, which was the case contemplated by the statute, the lien could not be discharged, except by making a deposit for the whole sum claimed and interest, which was expressly allowed by the statute.<sup>3</sup> Where a lien law provided how liens might be discharged, these express enactments negative the idea that the legislature intended to vest in the court the power to discharge the liens by other processes, or for other causes, and particularly upon summary motion.<sup>4</sup> A mere order by the court authorizing the entry on the docket, "secured on appeal," which the lien law does not justify, will not have the effect of discharging the lien;<sup>5</sup> so, unless special authority was given, it would be improper, after a reference of the lien claim had been made to a referee, for the court to discharge the lien upon a summary application on affidavits as to the merits. The claimant should have an opportunity to try it according to the regular course of proceeding in

<sup>1</sup> *Parsons v. Winslow*, 1 Grant Cas. (Penn.) 160.

<sup>2</sup> *Fettrich v. Totten*, 2 Abb. Pr. n. s. (N. Y.) 264.

<sup>3</sup> *Dowdney v. McCollom*, 5 Daly N. Y., 240.

<sup>4</sup> *Matter of Lien on 740 Broadway*, 15 Abb. Pr. (N. Y.) n. s. 336.

<sup>5</sup> *Hallahan v. Herbert*, 11 Abb. Pr. (N. Y.) n. s. 326.

such cases.<sup>1</sup> The mere appointment of a receiver under a creditor's bill against one entitled to a lien, with an order to make an assignment to him, where none is shown to have been made, and the receiver has made no claim to the debt, will not operate to release the lien.<sup>2</sup> Again, where a statute provides that the lien may be discharged in either of several modes, and among others "by an entry of the clerk, made in the book of liens, after one year has elapsed since the filing of the claim, stating that no notice has been given to him of legal steps to enforce the lien," etc., and that the lien "shall continue until the expiration of one year from the creation thereof, and until judgment rendered in any proceedings for the enforcement thereof," and proceedings are not commenced within the period, the lien ceases at the end of the statutory time; in which case the clerk should make an entry of discharge to clear the docket. Indeed, the clerk might be forced by mandamus to make the entry, after demand and refusal. Under this statute it has been further held, that if the proceedings have been properly instituted within the statutory period, a mere failure on the part of the claimant to notify the clerk of that fact does not give to the owner a right to a discharge, but the same may be proceeded with to judgment. It is proper for the clerk, at his option, in the exercise of his official discretion, when applied to make the entry of discharge, to require an affidavit that no notice has been left with him, during the year, of proceedings to enforce the lien. If the clerk has not been served with notice by the defendant, he may, nevertheless, after the expiration of the time in which proceedings may be begun, or his own motion, make an entry of discharge of the lien. But in doing this he should act with extraordinary precaution, which would only be a proper exercise of official duty. For under the statute, if the clerk under such circumstances makes the entry of discharge, the lien is gone by the ministerial act of the clerk, and the court could not interfere as against the right of an innocent purchaser after such an entry, who had purchased upon the warrantable presumption that the lien was discharged in the manner provided by law; and it is extremely doubtful if relief could be given even as between a sub-contractor and owner.<sup>3</sup> Under the same statute, it has been held by another court that the lien ceases by the limitation of time prescribed, and, consequently, no order requiring the clerk to enter the dis-

<sup>1</sup> *McGuckin v. Coulter*, 10 Abb. Pr. (N. Y.) N. S. 128.

<sup>2</sup> *Barstow v. McLachlan*, 99 Ill. 641.

<sup>3</sup> *Paine v. Bonney*, 4 E. D. Smith, 734.

charge is necessary.<sup>1</sup> So, where an act declares that the lien may be discharged in any one of several methods, the happening of any of the events, or the performance of any of the acts mentioned, operates, *per se*, as a discharge, without necessity for further act by any person.<sup>2</sup> Where "the lien created by the filing of the notice shall continue for one year thereafter; but if within such year proceedings are commenced, such lien shall continue until judgment is rendered thereon," the lien ceases at the expiration of the year, unless the proceedings are commenced as required by statute.<sup>3</sup> In the city of New York the court has jurisdiction to make an order cancelling the lien on the giving of a bond.<sup>4</sup> In a mechanics' lien case against the owner and the contractor, a payment into court by the owner of a part of the demand to release the lien, and its acceptance, *pro tanto*, by the plaintiff, does not discharge the action against the contractor for the remainder.<sup>5</sup>

§ 303 *a*. **Discharge by Security.** — Some States have adopted special provisions allowing the owner to discharge the lien by filing in the proper office sufficient bail to answer the result of the lien proceedings. In all such cases, the statute must be strictly followed by the party seeking its benefits, and the mechanic will be confined to the same, in his rights against the sureties. Thus where a defendant may file a written undertaking, with surety to be approved by the court to the effect that he would pay the judgment that might be recovered, and costs, and thereby release the property from the lien, a decree may be entered personally against the owner for the amount due, but there is no precedent for a like judgment against the sureties either at law or in equity, unless it be expressly so stipulated in the instrument, or unless the parties enter into a recognizance, which is matter of record. The remedy is an action at law against the sureties.<sup>6</sup> So, where the statute to enforce the lien provides for an equitable proceeding, and a mechanic brings an action at law declaring on the common counts in assumpsit, the judgment in this action against the owner is not admissible in evidence against a party who, subsequently to the commencement of the action at law, became surety by which the lien was released.<sup>7</sup> Again, where the lien has been discharged by paying

<sup>1</sup> Mathews v. Daley, 38 How. Pr. (N. Y.) 382.

<sup>2</sup> Mushlitt v. Silverman, 50 N. Y. 360.

<sup>3</sup> Kelsey v. Rourke, 50 How. Pr. (N. Y.) 315.

<sup>4</sup> [McKenna v. Edmonstone, 64 How. Pr. 461.]

<sup>5</sup> [Hydraulic Press Brick Company v. Neumeister, 15 Mo. App. 592.]

<sup>6</sup> Phillips v. Gilbert, 101 U. S. 721.

<sup>7</sup> Phillips v. Coburn, 2 MacArthur (D. C.), 409.

the money into court or giving security, which is "substituted for the premises against which the claim is filed and shall abide the final judgment of the court thereon," the proceeding by *scire facias* upon the claim is not the proper form to determine the rights of the plaintiff. He must proceed upon the bond, or if the money has been paid into court, the court will award an issue to determine whether any, and if any, what amount is due to the plaintiff.<sup>1</sup> "Upon security, approved by the court in double said amount, being entered in the manner to be prescribed by the court, such security shall be substituted for the premises," etc., after a *scire facias* has been issued, defendant cannot enter security in the usual form. The court will not approve of the security unless the issuing of the *scire facias* is recited in the bond and it contains a warrant of attorney for entering judgment for the amount that shall be found due with interests and costs.<sup>2</sup> The security may now be entered at any time before *levari facias*.<sup>3</sup> A motion by an owner to remove or discharge a lien should be made in the proceedings to enforce the lien on notice to the lienors, and not by an action in equity.<sup>4</sup> Under a law which provides that "any person having an interest in property upon which a lien has been claimed" may release the same by giving bond, a former owner of land, which he has conveyed with a warranty against encumbrances has no such interest in the estate as entitles him to dissolve it, under the foregoing statute.<sup>5</sup> Transfer of a note given for materials will, while the note is in the hands of a stranger to the original contract for materials, defeat the lien, but if the lienor afterwards regains the note by paying its amount to the indorsee upon its dishonor, he can then enforce the lien.<sup>6</sup>

§ 304. **When Lienor cannot enter Discharge.** — It has been heretofore remarked that ordinarily a claimant may at his own option enter a dismissal of the proceedings to foreclose the lien. But this right is sometimes restricted by statute. For example, under a law which allows the owner to call on the lien claimant to proceed, and proceedings are instituted, the claimant can no longer submit to a nonsuit without the consent of the owner; and if there be a failure of proof sufficient to establish the lien, the owner may demand a verdict and judgment in his favor,

<sup>1</sup> Seipel v. Wierman, 8 Phila. 26; Hoff-  
man v. Haines, Id. 248; Day v. Garrett,  
12 Phila. 265.

<sup>2</sup> Hood v. Building Ass., 9 Phila. 105;  
Maulsby v. Simpson, 11 Phila. 196; Day  
v. Garrett, 12 Phila. 265.

<sup>3</sup> Day v. Garrett, 12 Phila. 265.

<sup>4</sup> Spratt v. Nicholson, 3 Daly (N. Y.),  
182.

<sup>5</sup> Glendon v. Townsend, 120 Mass.  
346.

<sup>6</sup> [German Bk. v. Schloth, 59 Iowa,  
316, 322; citing Farwell v. Grier, 38  
Iowa, 83.]



which will operate as a final discharge of the lien.<sup>1</sup> Again, if the law secure to a party against whose property liens are filed the right to call upon the claimant to proceed, and he gives the notice provided for by statute, and the claimant, though served with such notice, neglects to file a statement of his demand as required within the time specified in the law, the court may on motion discharge the lien.<sup>2</sup> So, where a statute provides for a formal suit, and an appearance of all the lien claimants, in order for a settlement of the entire liens against the property, and the court having once acquired jurisdiction by a regular proceeding, the lien of other claimants cannot be divested by any dismissal by the parties who originally instituted the suit. They have a right to withdraw their claim, but no power to affect the proceedings so far as it may concern other lien claimants not in privity with them, who had by petition become parties claimant. These latter have as much right to proceed as the original actors.<sup>3</sup> Where a proceeding is commenced by any claimant, and a prior or subsequent lienor is made a party and duly appears, he has thereafter a right to carry through the proceedings for his own benefit, and if the claimant instituting the proceedings allows his lien to expire, or in any way becomes disentitled to continue the proceedings, any other lienor who has appeared in the proceedings may continue them for the enforcement of his own lien.<sup>4</sup> So, in an action to foreclose, where numerous lienors are parties defendant, the settlement with the owner and withdrawal of some of the lienors, including the sole plaintiff in the action, does not prejudice any other lienors.<sup>5</sup>

§ 304 *a*. **Destruction of the Building is no Discharge.**— If the lien is once fixed on the realty, it clings to the land after the destruction of the building.<sup>6</sup> Moreover the lien attaches to the money received on sale of the land and remnants of the mill and machinery.<sup>7</sup>

<sup>1</sup> *Walter v. Streeper*, 2 Miles (Penn.), 348.

<sup>2</sup> *Carroll v. Caughlin*, 7 Abb. Pr. N. S. (N. Y.) 72.

<sup>3</sup> *Elliott v. Ivers*, 7 Nev. 287.

<sup>4</sup> *Abram v. Boyd*, 5 Daly (N. Y.), 321.

<sup>5</sup> *Morgan v. Stevens*, 6 Abb. N. Cas. 356.

<sup>6</sup> [*Stewart v. Broome*, 59 Tex. 466; see § 12.]

<sup>7</sup> [*Paddock v. Stout*, 121 Ill. 571, 581.]

## CHAPTER XXVII.

## NATURE OF PROCEEDING.

§ 305. **When a Proceeding in Rem.**<sup>1</sup>—The lien of the mechanic being a remedy, having for its object the subjection of specific property to the payment of an indebtedness arising out of its construction or improvement, the proceeding, so far as this object is to be attained, is *in rem*. Thus, under a statute which secured a lien for the value of the labor and materials “upon such house or building and appurtenances, and upon the lot of land upon which the same stand, to the extent of the right, title, and interest existing at the time of notice of such owner,” etc., the proceeding to enforce this remedy has been declared to be *in rem* and not *in personam*, and operates only as a foreclosure of a lien, and not as an action for the collection of a debt;<sup>2</sup> but under such a statute, it is not an action “affecting the title to real estate, or an interest therein.”<sup>3</sup> Again where it was provided that parties “shall have a lien on the house and the ground on which the same is erected,” the court held the remedy of the mechanic to be only *in rem*, and not *in personam*.<sup>4</sup> So, where “every building shall be subject to a lien for the payment of all debts contracted for work done or materials furnished,” and “the proceedings to recover the amount of any claim, as afore-said, shall be by writ of *scire facias*,” etc., to be enforced “by a writ of *levari facias*,” “to be levied of the said building and lot of ground,” it is a proceeding *in rem*, by *scire facias* upon a record.<sup>5</sup> The proceeding in *scire facias* is strictly *in rem*.<sup>6</sup> “Whenever any building, etc., shall be constructed . . . such building is hereby made liable, and shall stand pledged, for all the work done in the construction of such building,” etc., and

<sup>1</sup> This section was cited with approbation in *Waldroff v. Scott*, 46 Tex. 1.

<sup>2</sup> *Randolph v. Leary*, 3 E. D. Smith, 637; *Conkright v. Thomson*, 1 E. D. Smith, 661; s. c. 4 Abb. Pr. (N. Y.) 205; *Grant v. Vandercook*, 57 Barb. (N. Y.) 165; *Quimby v. Sloan*, 2 Abb. Pr. (N. Y.) 93.

<sup>3</sup> *Wheeler v. Scofield*, 67 N. Y. 311.

<sup>4</sup> *Homans v. Coombe*, 3 Cranch C. C. 365; *Gordon v. Torrey*, 2 McCart. Ch. (N. J.) 112.

<sup>5</sup> *Miller v. Barroll*, 14 Md. 173; *Carson v. White*, 6 Gill (Md.), 17.

<sup>6</sup> [*Shryock v. Buckman*, 121 Penn. St. 248.]

no provision is made for the personal obligation of the owner, the same construction has been given, that it was a proceeding *in rem*, and not *in personam*. The owner being cited to defend his interest in the estate, the land, building, etc., are, for the purposes of the lien, made debtor for the improvements.<sup>1</sup> Suits to enforce mechanics' liens are in the nature of proceedings *in rem*, though not so, perhaps, in technical strictness, for they do not profess to conclude all the world. It is not essential, unless the statute requires it, that there should be personal service on the owner. The law may provide for constructive service of process. The kind of process and mode of service is material only with reference to the nature of the judgment. A defendant can be bound personally only by his coming or being brought personally within the jurisdiction of the court. But his land may be bound without actual service of process upon him, in cases where the only object of the proceeding is to enforce a claim against it specifically of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.<sup>2</sup> Where work and materials were furnished a house, and subsequently a seizure was made of the property by officers of the United States for an alleged offence against its laws, and it was proceeded against as forfeited, such a suit is undoubtedly *in rem*, and gives the court first taking possession a necessarily exclusive jurisdiction over the *res*, and for the purposes of that suit, withdraws jurisdiction from the courts of a State, to enforce a mechanics' lien by sale, where such proceedings to enforce the lien are subsequent to the proceedings of forfeiture. But the denial to the State court to pass title under its judgments does not necessarily prohibit that court from proceeding to determine the merits of the controversy as to the claim of the mechanics' lien. It simply prevents any title passing or acts of dominion antagonistic to the paramount right of the United States court to adjudicate the title.<sup>3</sup> Accordingly a sale and marshal's deed under the forfeiture proceedings carries the legal title to the premises as against a sale under execution to enforce the

<sup>1</sup> *Butler v. Rivers*, 4 R. I. 38.

<sup>2</sup> [*Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. R. 294.]

<sup>3</sup> [*Id.*]

mechanics' lien.<sup>1</sup> The criterion adopted in some of the cases to determine the character of the action seems to be that when a special execution can only be issued against the property, it is classed as a proceeding *in rem*;<sup>2</sup> as where it is provided that "no judgment on *scire facias*," to enforce the lien, "shall warrant the issuing an execution, except against the building upon which the lien existed."<sup>3</sup> The proceeding being *in rem*, the lien must appear by the record and not by outside acts of estoppel.<sup>4</sup>

§ 306. **Only Quasi in Rem.** — It is, however, to be observed that the proceedings to enforce a mechanics' lien, although thus declared to be *in rem*, are not purely so, in the sense used in admiralty.<sup>5</sup> The suit is always *inter partes*, and confined to such parties. The judgment binds only the interest of those who are parties to the proceeding, or might become such, and are in default if they do not.<sup>6</sup> So, although a mechanics' lien law "gives a lien upon the land, and a judgment for the mechanic shall be that he recover the amount found due, and that his lien on the tract of land is established, and the judgment shall order a special execution to issue against the given tract of land, and the judgment shall not be a lien on any other property of the defendant," still it is not a technical proceeding *in rem*, because it must be commenced, as in ordinary actions, upon account. It must be against some person by name as defendant, and can only be by virtue of a contract with the owner of the land. The judgment, likewise, must be rendered against some person as defendant, and cannot be against the land alone, as the lien extends only to his interest.<sup>7</sup> There must be a suit against the party promising, not a mere proceeding *in rem*, regardless of contract. The contract is the principal, the lien an incident, and it must be enforced along with the contract.<sup>8</sup> And, on the other hand, where it is expressly provided that "in all cases of lien created by this act the person having a claim filed in accordance with its provisions may proceed to recover it by personal action against the debtor," etc., by the words "personal action" it is not intended to mean the ordinary action *in personam* for the recovery of money, because such an action is

<sup>1</sup> [Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294.]

<sup>2</sup> Delahay v. Clement, 4 Ill. 201.

<sup>3</sup> Lewis v. Morgan, 11 Serg. & R. 234 ; Anshutz v. McClelland, 5 Watts (Penn.), 487.

<sup>4</sup> Hunter v. Lanning, 76 Penn. 25.

<sup>5</sup> Mochon v. Sullivan, 1 Mont. 472.

<sup>6</sup> M'Kim v. Mason, 3 Md. Ch. 186 ; [Franklin Savs. Bk. v. Taylor, 131 Ill. 376, 385.]

<sup>7</sup> Redman v. Williamson, 2 Iowa, 488.

<sup>8</sup> [Farnham v. Davis, 79 Me. 283, 285.]

not at all calculated to give the plaintiff the relief which the statute provides. The judgment in such action would bind the real estate of the debtor only from the time it was rendered, whereas he seeks to make the building liable from the time the lien is given by statute.<sup>1</sup> The petition to enforce a mechanics' lien is a chancery proceeding, and not strictly a proceeding *in rem*.<sup>2</sup> Where a statutory lien was provided for labor on railroads prior to all others, and a party brought suit in a State court to enforce the lien against the property on which a mortgage existed, it was held that although the lien for labor was superior to that of the mortgage, yet the suit in the State court could not be sustained as one *in rem*, because it is essential to such a proceeding that there should be at least constructive notice by some form of publication or advertisement to adverse claimants to appear and maintain their rights before a judgment in such a proceeding can operate even as *prima facie* evidence; and in the present case, no notice, either personal or constructive, was provided for by statute, or given to the other lien-holders, and consequently the judgment in the State court was not only not conclusive, but, originating after the mortgage was made, the lien claimant is bound to prove affirmatively the existence and priority of his lien under the statute.<sup>3</sup>

§ 307. **No Personal Judgment, unless authorized by Statute.**<sup>4</sup>—The remedies created in the mechanics' lien laws are of an entirely statutory and extraordinary nature, and the provisions for their enforcement are to be strictly construed.<sup>5</sup> The principle that, where the complaint contains averments sufficient to authorize a judgment, the court may grant any remedy warranted by the facts, although differing from the relief demanded, does not apply to actions under the mechanics' lien law. Accordingly, where the statute authorizes a party to proceed against the property on which he has acquired a lien, but not against the defendant personally, he has no right, and the court no power to grant him the right, to change the nature of the proceeding.<sup>6</sup> So, a lien given to machinists on machinery furnished or put up by them, cannot be enforced by summary proceedings as in cases of liens against steamboats, but the same must be prosecuted as is provided for the enforcement of

<sup>1</sup> Dewey v. Fifield, 2 Wis. 73.

<sup>2</sup> [Paddock v. Stout, 121 Ill. 571.]

<sup>3</sup> [Hassall v. Wilcox, 130 U. S. R., 493.]

<sup>4</sup> [See § 448.]

<sup>5</sup> Grant v. Vandercook, 57 Barb. (N. Y.) 165; Doellner v. Rogers, 16 Mo. 340.

<sup>6</sup> Sinclair v. Fitch, 3 E. D. Smith, 677.

mechanics' liens.<sup>1</sup> In California the foreclosure of a lien is in the nature of a proceeding *in rem*, in which no personal judgment can be recovered against the estate of a deceased owner.<sup>2</sup> No consideration of equitable rights will enable a court of equity or law, except in the manner expressly provided, to sustain these proceedings. In all cases, if a party contemplated a lien when he delivered or furnished his work and materials, he should have contemplated taking the proper steps to enforce it, and within the proper time; just such a lien as the statute provided for, and no other.<sup>3</sup> And therefore a claimant cannot use the proceedings commenced to foreclose a lien, for the purpose of recovering a personal judgment, after the lien has expired by statutory limitation.<sup>4</sup> Unless specially authorized by statute, an entirely different cause of action cannot be joined with the lien-claim. So where the lien-claim fails, a judgment cannot be entered on a contract.<sup>5</sup> But if, on the other hand, the statute itself contemplates a personal judgment in the same action against any of the parties, and the proceedings of a materialman are insufficient for the purpose of enforcing the lien, he may, notwithstanding, take a personal judgment, if he establish his right to it.<sup>6</sup> Or, when permitted by the act, a proceeding to enforce a mechanics' lien may be converted by amendment into an ordinary action for work done and materials furnished.<sup>7</sup>

§ 308. **Proceeding is Sui Generis.**—The character of the proceeding, whether legal or equitable, depends upon statutory provision. A legislature has the constitutional power to frame acts making the proceeding partly according to the course of the common law, and partly according to proceedings in equity.<sup>8</sup> In its earlier history, before any great progress had been made in law reform, the common-law writ of *scire facias* was the most usual remedy employed. In its main feature, as a writ, founded on some matter of record, it peculiarly recommended itself to those States where notice or claim of lien was to be filed in some office of public records, and the subsequent proceedings were regarded as a means of perfecting the lien thus obtained. The assertion of this lien, however, in courts of law was a new juris-

<sup>1</sup> Columbus Iron Works Co. v. Loudon, (N. Y.) 455; Hammond v. Bush, Id. 53 Ga. 433. 152.

<sup>2</sup> [Booth v. Pendola, 88 Cal. 36.]

<sup>3</sup> Quimby v. Sloan, 2 E. D. Smith, Ct. 231. <sup>5</sup> Weyer v. Beach, 21 N. Y. Supreme

594. <sup>6</sup> More v. Ruggles, 15 Wis. 275.

<sup>4</sup> Grant v. Vandercook, 57 Barb. <sup>7</sup> Dunning v. Stovall, 30 Ga. 444.

(N. Y.) 165; s. c. 8 Abb. Pr. N. s. <sup>8</sup> Edwards v. Derrickson, 4 Dutch. (N. J.) 45.

diction. The fundamental principles underlying it were largely equitable, and special provisions for each step in the cause were necessary to mould the writ to its new uses.<sup>1</sup> In so far as the suit is to be enforced in a court of law, and subject to the ordinary rules of pleading in legal proceedings, it partakes of a legal character; as a foreclosure of a lien, and partition of the proceeds of sale among all claimants upon terms of equality, it is impressed with the characteristics of a proceeding in equity. And it may be asserted that wherever the lien exists, and whatever machinery has been adopted for its enforcement, the remedy is *sui generis*,<sup>2</sup> and not to be considered exclusively a common-law action or equity proceeding, but either, or both, as the statute may indicate. Thus, if an act which authorizes the filing of a bill or petition as in chancery, but to secure a more speedy trial directs the case to be docketed, on the common-law appearance docket, and that the same rules shall be observed as in suits at law, and at the same time requires the court "to give judgment according to the justice and equity of the case," the obvious intention of the legislature is to give an easy, cheap, and sure remedy to that class of the community for whose benefit the law was passed, by extending to them all the facilities of common-law evidence, without the delay and expense of taking depositions, and extends at the same time all the liberal and appropriate rules of equity.<sup>3</sup> So, where the claimant might proceed against the builder and owner by the same proceeding, with a right of personal action against the builder and enforcement of lien against the special property improved, in which all lien claimants participate equally, the proceeding was in its very nature partly a common-law and partly a chancery proceeding. So far as related to the debtor, it was a common-law proceeding; so far as it related to the enforcement of the lien, it was necessarily a chancery proceeding, and in the nature of a foreclosure of a mortgage; *quoad hoc*, the filing of the lien was a bill in chancery.<sup>4</sup> Where the lien "may be enforced by attachment, either at law or in equity," and this is the only provision on the subject, an attachment is the only remedy to enforce it.<sup>5</sup> But, where it was provided that in a statutory lien-action, the forms and proceedings "shall" be the same as in ordinary actions, it

<sup>1</sup> Doellner v. Rogers, 16 Mo. 340.

<sup>4</sup> Edwards v. Derrickson, 4 Dutch.

<sup>2</sup> Spencer v. Barnett, 35 N. Y. 94; Chambersburgh M'fg Co. v. Hazelett, 3 Brewst. (Penn.) 98.

(N. J.) 45.

<sup>5</sup> Barnes v. Thompson, 2 Swan (Tenn.), 314.

<sup>3</sup> Greenough v. Wiggington, 2 Greene (Iowa), 435.

was construed as permissive and not mandatory, and the word "shall" as meaning "may."<sup>1</sup>

§ 309. **When in Nature of Foreclosure of Mortgage.**—Where no special mode of proceeding is pointed out for enforcing the lien, the remedy pursued should be in accordance with the general principles and practice relating to the enforcement of liens. Thus on a sub-contractor bringing suit to enforce his lien, he should make his employer a party as well as the owner of the land, so as to have adjudicated the amount of the debt due at the same time, and also to make others who have liens, parties to settle their validity and adjust their priority.<sup>2</sup> When the scope of the statute is to give an action "in the nature of a foreclosure of mortgage," for the enforcement of the lien against the specific property, the proceeding is an equitable one.<sup>3</sup> So, where it says the mechanic "shall have a lien in the nature of a mortgage," and speaks of suits upon such contracts resulting in judgments and decrees, it has been said that, as executions may issue upon decrees in chancery, as well as judgments at law, there does not appear to be anything in the wording of the act which confines the remedy to a court of law, but rather the reverse, as being in the nature of a mortgage, which courts of chancery foreclose.<sup>4</sup> Where the statute authorizes the court in a suit to enforce a mechanics' lien to order both a sale of the real estate that is subject to the lien, and judgment against the owner thereof for any deficiency in the proceeds of the sale, "in like manner and with like effect, as in actions for the foreclosure of mortgages," the relief is purely equitable, and the proceeding in the nature of a suit in equity.<sup>5</sup> Where the provisions for making new parties, legally or equitably interested, are the same as in chancery, and contemplate the final settlement of all their rights and interests, and the proceeding is in all its features a chancery proceeding, and totally inconsistent with a suit at law, — it will be deemed by the court to have been intended by the legislature to partake of the character of the former.<sup>6</sup> Again, where the proceeding is denominated "an action to foreclose a lien," and the procedure to judgment is very similar to that in an action to foreclose a mortgage, it is in the nature of an equitable remedy,

<sup>1</sup> Parks v. Crockett, 61 Me. 490.

<sup>2</sup> Waldroff v. Scott, 46 Tex. 1.

<sup>3</sup> Randolph v. Leary, 4 Abb. Pr. (N. Y.) 205; Gridley v. Rowland, 1 E. D. Smith, 670; Henderson v. Sturgis, 1 Daly (N. Y.), 336; Hauptman v. Catlin, 4 Abb. Pr. (N. Y.) 472.

<sup>4</sup> Montandon v. Deas, 14 Ala. N. S. 33.

<sup>5</sup> [Idaho and Oregon Land Co. v. Bradbury, 132 U. S. R. 509; 19 Wall. 81; 106 U. S. R. 408; 113 U. S. R. 316.]

<sup>6</sup> Kimball v. Cook, 6 Ill. 423.



and governed by its rules.<sup>1</sup> So, if the lien is to be enforced "by filing a bill in chancery," it will be held to be a suit in the nature of a foreclosure of a mortgage,<sup>2</sup> although not technically such.<sup>3</sup> Where the court has power to refer a cause to a referee, when it will require the examination of a long account on either side, and a lien claim involved the details of the work to the extent of three hundred items, it was held to be a case within the above law.<sup>4</sup> In Rhode Island a mechanics' lien is rather in the nature of a mortgage than of an attachment. It is not acquired by an adverse proceeding after the debt has been incurred, but it accrues as the debt accrues, being incident to the improvement, and therefore the owner of the estate to which it attaches consents to it when he consents to the improvement.<sup>5</sup>

§ 310. **When Chancery Rules of Procedure govern.** — When the proceeding is declared expressly to belong to a recognized class of actions, the forms and rules of procedure applicable to that class will be held to apply to the enforcement of the lien.<sup>6</sup> As where it was provided that the foreclosure "shall be governed by the rules of proceeding and decisions in the court of chancery so far as applicable," chancery practice is to be observed.<sup>7</sup> The same proposition has been held applicable to suits under this law, even in the absence of such statutory direction. As where it is apparent from the other provisions that it is a chancery proceeding, it will be governed in all respects by its rules, except so far as the statute provides otherwise.<sup>8</sup> Accordingly, in such cases, all the rules of chancery in regard to the admission of evidence will be adopted. Some cannot be held of force and others not, else suitors would never know on what they have to depend, and the rules of evidence would be ever fluctuating and uncertain, until every imaginary question had been settled. For these reasons, the answer of a defendant to foreclose the lien, so far as it is responsive to a bill or petition, would be admissible evidence.<sup>9</sup> So, if a complainant might waive by chancery practice the sworn answer of the defendant, and which is done in an action on the lien, the answer, though sworn to, cannot be received in evidence, and has no other weight than an answer not sworn to, as in other chancery causes.<sup>10</sup> But when

<sup>1</sup> *Willer v. Bergenthal*, 50 Wis. 474.

<sup>2</sup> *Ainsworth v. Atkinson*, 14 Ind. 538.

<sup>3</sup> *Randolph v. Foster*, 3 E. D. Smith, 648.

<sup>4</sup> *Tooker v. Rinaldo*, 18 N. Y. Supreme Ct. 154.

<sup>5</sup> [*Briggs v. Titus*, 13 R. I. 136, 138.]

<sup>6</sup> *McGraw v. Bayard*, 96 Ill. 153; *Cairo v. Fackney*, 78 Ill. 120.

<sup>7</sup> *Clear Creek et al. v. Root*, 1 Colo.

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<sup>8</sup> *Sutherland v. Ryerson*, 24 Ill. 517.

<sup>9</sup> *Kimball v. Cook*, 6 Ill. 423.

<sup>10</sup> *Clarke v. Boyle*, 51 Ill. 104.

regularly sworn to, it has the same effect as an answer in chancery. It is then to be overcome by two witnesses, or by one witness and strong corroborating circumstances. The rule is improperly stated when it is said that it is equal to two witnesses; then it would require three witnesses to prevail against it, — two against the answer, and one to establish the contract or other fact, which is not the law.<sup>1</sup> Questions of pleading as well as evidence come within the same rule. A claimant of a lien, when made defendant in such a cause, and who wishes to avail himself of it, must do more than make a mere admission in his answer that he has such claim, as a naked statement that it is a lien is not sufficient, and would not authorize the court on its own motion to afford affirmative relief. It should, in analogy to chancery pleading, be set up in the answer with a claim of its benefit, or by a cross-bill.<sup>2</sup> So, when in chancery special replications are no longer allowed, and, if filed, they can only be treated as general replications, the same effect will be given to a special replication under the lien law.<sup>3</sup> And where the only exception made to its identity as a chancery proceeding is that oral testimony is to be taken before a jury as in an action at law, or a feigned issue out of chancery, the verdict stands in the place of evidence, and the party who impeaches it must preserve the testimony in the record, either by bill of exception or certificate of the judge.<sup>4</sup> Although an action to enforce the lien is declared to be prosecuted by equitable proceedings, and either party has a right, therefore, to move for a trial on written evidence, yet if this right is not sought in the court below, the case will not be triable *de novo* in consequence of the omission.<sup>5</sup> When it is a chancery proceeding, its rules apply to the practice of authorizing notice by publication in lien cases.<sup>6</sup> In the absence of a plain statutory provision making it an action at law, the proceeding to enforce a mechanics' lien must be taken upon the equity side of the court.<sup>7</sup> Proceedings under the lien law are in their nature equitable, and in Colorado until the present code was enacted, such proceedings were administered on the chancery side of the court.<sup>8</sup> In Wisconsin lien proceedings are made by statute equitable, but the complaint need not

<sup>1</sup> Morrison v. Stewart, 24 Ill. 24.

<sup>2</sup> Sutherland v. Ryerson, 24 Illinois, 517.

<sup>3</sup> Shaeffer v. Weed, 8 Ill. 511.

<sup>4</sup> Ross v. Derr, 18 Ill. 245.

<sup>5</sup> Kennedy v. Gauli, 44 Iowa, 547.

<sup>6</sup> James v. Hambleton, 42 Iowa, 303.

<sup>7</sup> [Finane v. Las Vegas Hotel & Imp.

Co., 3 N. Mex. 256; Houghton v. Las Vegas Hotel & Imp. Co., 3 N. Mex. 260.]

<sup>8</sup> [San Juan, &c. Co. v. Finch, 6 Colo. 214, 221; Williams v. Uncompahgre Co., 13 Colo. 470, 478; Decker v. Myles, 4 Colo. 553; Bradbury & Co. v. Butler, 1 Colo. App. 430, 433, citing Phillips, § 310.]

state a case for equitable relief.<sup>1</sup> In Virginia there are two mechanics' lien laws in force. If the contract is in writing, the lien may be acquired under the act of 1870 by filing a "true account," and a motion in equity, or it may be acquired under the law previously enacted by the recordation of the contract, and a bill in equity.<sup>2</sup> A lien suit cannot be changed into a suit at law by a counter-claim. Equity once having jurisdiction will retain it.<sup>3</sup> An unincorporated association that cannot be sued at law, may be attacked in equity and a lien decreed.<sup>4</sup> In Florida proceedings under the lien law are purely legal, and confer no equity powers on the court.<sup>5</sup>

§ 310 *a*. **Jury Trials, in case of.**—It has been held that the enforcement of the lien is so far not an action for the recovery of money only, as to come within a law providing for jury trials in actions "for money only."<sup>6</sup> So, an act giving liens against ships for the collection of demands for labor and materials, in which no provision was made for trial by jury, was held not to conflict in that regard with the constitutional right of jury trial.<sup>7</sup> The proceeding to enforce a mechanics' lien on vessels is not a claim upon a maritime contract, and not within the jurisdiction of courts of admiralty. It is a proceeding *in rem*, but no infringement upon the Federal maritime jurisdiction. And where such liens were enforceable in equity, before the adoption of a State constitution, it was held that the legislature might provide for their enforcement without a jury, when there was nothing in that instrument which prevented it.<sup>8</sup> When the proceeding is in equity, there is no absolute right of trial by jury.<sup>9</sup> In Nebraska it is held that an action to foreclose a mechanics' lien is essentially a suit in equity, and a party is not, as a matter of right, entitled to a jury trial therein.<sup>10</sup> So in Indiana there is no right to trial by jury in a lien foreclosure suit.<sup>11</sup> So in Dakota,<sup>12</sup> the defendant in a lien suit is not entitled to a jury as of right, even though he answers that the plaintiff has no cause of action, and sets up a claim for a sum due himself.<sup>13</sup> In an equity suit the court may of its own motion order

<sup>1</sup> [Moritz v. Splitt, 55 Wis. 441.]

<sup>2</sup> [Pairo v. Bethell, 75 Va. 825.]

<sup>3</sup> [Kilroy v. Mitchell, 2 Wash. 407 ;  
Instalment Building & Loan Co. v. Wentworth, 1 Wash. 467.]

<sup>4</sup> [Gress Lumber Co. v. Rogers, 85 Ga. 587, 591.]

<sup>5</sup> [Emerson & Co. v. Gainey, 26 Fla. 133.]

<sup>6</sup> Sumner v. Jones, 27 Minn. 312.

<sup>7</sup> Edwards v. Elliott, 36 N. J. L. 449.

<sup>8</sup> Sheppard v. Steele, 43 N. Y. 52.

<sup>9</sup> [Pairo v. Bethell, 75 Va. 825 ; Kenney v. Apgar, 93 N. Y. 539.]

<sup>10</sup> [Dohle v. Omaha Foundry, 15 Neb. 436.]

<sup>11</sup> [Albrecht v. The C. C. Foster L. Co., 126 Ind. 318.]

<sup>12</sup> [Gull River L. Co. v. Keefe, 6 Dak. 160, 163.]

<sup>13</sup> [Sumner v. Jones, 27 Minn. 313.]

a jury for the trial of a fact. The verdict in such case is merely advisory, and no error can be assigned in respect to admissions of evidence, or instructions to the jury.<sup>1</sup> But if the statute allows a party to claim a jury, and it is so claimed, its verdict is conclusive and not advisory.<sup>2</sup> Even where there is a right to claim a jury it is waived<sup>3</sup> by failing to claim a trial by jury before the production of any evidence. On issue of a fraudulent conspiracy to defeat a mechanics' lien by means of a mortgage, it was shown that the mortgage was given many years before the lien debt was created, and the court refused to allow the plaintiff to take the question of conspiracy to a jury.<sup>4</sup>

§ 311. **A Cumulative Remedy.** — It is to be borne in mind that the lien itself and the debt due for the work and materials are totally distinct. When the owner has himself ordered an expenditure on his land, there always existed a debt for which he was personally responsible, recoverable in an ordinary action of assumpsit. The lien, as an appropriation of a specific thing, has been superadded to this remedy, but has not interfered with its enforcement. The two remedies stand independently of each other.<sup>5</sup> As a general proposition, it is true that, if a party have several remedies for the recovery of the same debt, he may resort to them all, though he can have but one satisfaction. Thus, where a bond and mortgage is given to secure a debt, the creditor may have at the same time an action upon the bond and a suit in equity for the foreclosure of the equity of redemption and the sale of the land. So, under the mechanics' lien laws, a general action may be brought to enforce the indebtedness to recover a personal judgment, and another to obtain a decree or judgment on the lien;<sup>6</sup> though but one satisfaction can be obtained therefor.<sup>7</sup> If an attempt be made to collect the judgment upon both proceedings, that would always be stopped by the court.<sup>8</sup> Accordingly, where a suit by *scire facias* is a proceeding *in rem*, and the employer in no manner personally liable, his discharge under a bankrupt law would be no defence.<sup>9</sup> Again, where a party had secured the lien, the issuing of an attachment, and its levy upon the property of a debtor to secure

<sup>1</sup> [Huse v. Washburn, 59 Wis. 414 ; Bentley v. Davidson, 74 Wis. 420 ; Bradbury & Co. v. Butler, 1 Colo. App. 430, 433.]

<sup>2</sup> [Moritz v. Larsen, 70 Wis. 569, 573 ; Bentley v. Davidson, 74 Wis. 420.]

<sup>3</sup> [Keuney v. Apgar, 93 N. Y. 539.]

<sup>4</sup> [Kilburn v. Rice, 151 Mass. 442, 444.]

<sup>5</sup> McNiel v. Borland, 23 Cal. 144 ; West v. Flemming, 18 Ill. 248.

<sup>6</sup> Webb v. Van Zandt, 16 Abb. Pr. (N. Y.) 190.

<sup>7</sup> Delahay v. Clement, 4 Ill. 201.

<sup>8</sup> Corn Exch. Co. v. Babcock, 8 Abb. Pr. N. S. 256.

<sup>9</sup> McCullough v. Caldwell, 5 Ark. 237 ; Brown v. Morrison, Id. 217.

the same debt, does not destroy the lien, as the remedies are cumulative, and may be pursued at the same time. And although it might happen in some cases, if a party should attempt to secure them in separate suits, that it would be proper to put him to his election, yet it is no defence to a proceeding to enforce this lien that in a former action for the same debt an attachment had been issued, when such action had been dismissed, and nothing was realized by the attachment.<sup>1</sup> Indeed, the lien remedy is considered so entirely disconnected with the debt, that, in the settlement of an intestate's estate, contracts for building, though secured by the mechanics' lien on the land, are a charge on the personal estate in the first instance.<sup>2</sup>

§ 312. **Sub-contractor's Right to both Remedies.**<sup>3</sup>—The same principle applies under those laws where a lien is secured to a sub-contractor, with a right of action against the owner to enforce the lien, and against his employer personally for the debt. It has been held that the pendency of a suit against the owner is no defence to a separate action against the contractor at the same time, as a party who has a claim against several persons for the same debt may bring separate actions against both parties simultaneously. It is only after a satisfaction has been recovered that it is a defence to the further prosecution of another suit.<sup>4</sup> An action upon a promissory note given to a sub-contractor as collateral security for the payment of work, contracted to be done by him, may be maintained simultaneously with proceedings to enforce a mechanics' lien; but there can be but one satisfaction.<sup>5</sup> So taking the necessary steps to secure a lien in no wise affects or impairs a claimant's right to proceed against his employer to recover the amount due.<sup>6</sup> Again, on the other hand, where the law gave both a "personal action against the debtor, or by *scire facias* against the debtor and owner of a building," a proceeding by personal action against the debtor is not a waiver of the lien and right to proceed thereunder.<sup>7</sup>

§ 312 *a*. **The Summons** need not state the kind of lien, or the property, nor need a copy of the complaint be attached. The summons directs attention to the complaint, and the defendant can easily acquaint himself with its statements.<sup>8</sup> In case of materials furnished a railway company, service of notice in a

<sup>1</sup> Brennan v. Swasey, 16 Cal. 140.

<sup>2</sup> Taylor v. Taylor, 3 Bradf. 54.

<sup>3</sup> This section was cited with approbation in Waldroff v. Scott, 46 Tex. 1.

<sup>4</sup> Gridley v. Rowland, 1 E. D. Smith, 670.

<sup>5</sup> Gambling v. Haight, 59 N. Y. 354.

<sup>6</sup> Maxey v. Larkin, 2 E. D. Smith, 540; Pollock v. Ehle, Id. 541.

<sup>7</sup> Vandyne v. Van Ness, 1 Halst. Ch. (N. J.) 485.

<sup>8</sup> [Bewick v. Muir, 83 Cal. 368.]

station agent is sufficient service on the company.<sup>1</sup> To justify service on the owner's agent in a log lien suit the officer's return must show his inability to find the owner in his bailiwick. Service on the return day will not justify a justice in proceeding at once to trial in the absence of the owner.<sup>2</sup> The date of issuing summons must be endorsed on the lien-claim, or it will not be good.<sup>3</sup> If the record fails to show proper summons or publication if the defendant is a non-resident of the State, the suit will be dismissed.<sup>4</sup> But an attempt to commence an action by delivery of the summons to the sheriff, with an intent that it should be actually served, is equivalent to the commencement of it so far as affects the limitation of time imposed.<sup>5</sup> Answering to the merits waives defects of service, although the answer reserved a right to move to dismiss for want of proper service.<sup>6</sup> In South Carolina a summons need not be issued. Service on the defendant of the petition, and an order to appear and answer is sufficient.<sup>7</sup>

§ 312 *b*. **Attachment.** — The provision that liens "shall be enforced by attachment in manner provided by law," has reference to the *general* attachment law of the State, not to attachments authorized in special cases, and the "manner" means by appropriate affidavit and bond.<sup>8</sup> In Vermont the lienor must begin suit and *attach* the property within three months after the statement of lien is filed if the debt is then due, or if not then due within three months after it becomes due, and if there is no express agreement as to when the price shall be paid, the law implies that it is to be paid for when the job is done.<sup>9</sup> So in New Hampshire a lien for lumber and materials used in erecting a building and furnished by virtue of a contract with the owner is secured by an attachment made within ninety days from the time the last materials were furnished under the contract.<sup>10</sup>

<sup>1</sup> [Morgan v. Chicago, &c. R. Co., 76 Mo. 161, 169 *et seq.*]

<sup>2</sup> [Noyes v. Hillier, 65 Mich. 636.]

<sup>3</sup> [Currier v. Cummings, 40 N. J. Eq. 145, 149; Wheeler v. Almond, 17 Va. 161.]

<sup>4</sup> [Lomax v. Besley, 1 Colo. App. 21.]

<sup>5</sup> [Hammond v. Shephard, 50 Hun, 318.]

<sup>6</sup> [Oliver v. Fowler, 22 S. C. 534.]

<sup>7</sup> [Johnson v. Frazee, 20 S. C. 500; Oliver v. Fowler, 22 S. C. 534.]

<sup>8</sup> [Strong v. L. W. &c. Ass., 25 Fla. 765.]

<sup>9</sup> [Piper v. Hoyt, 61 Vt. 539.]

<sup>10</sup> [Pike v. Scott, 60 N. H. 469.]

## CHAPTER XXVIII.

## JURISDICTION.

*Jurisdiction of the subject-matter : —*

§ 313. **Not enforceable in Foreign Courts.** — There are two elements in every case, one of which is essential to give a court jurisdiction to render a valid judgment on the lien. First, jurisdiction of the subject-matter; or, second, of the parties. As each State has exclusive jurisdiction over the territory within its limits, and mechanics' liens are only in the nature of charges upon real estate, there is no power residing in foreign tribunals to enforce these liens. They are the creatures of local legislation,<sup>1</sup> governed by the *lex rei sitæ*, and enforceable alone in the tribunals of the State in which the property is situated.<sup>2</sup> Under the Constitution of the United States and the Judiciary Act of 1789, the courts of the United States have, however, in suits between aliens and citizens, and citizens of different States, jurisdiction in civil causes at law and in equity. And the Federal judiciary have, notwithstanding objection, expressly recognized and enforced these liens on property within their jurisdictions.<sup>3</sup> Thus, it has been held that a mechanics' lien cannot be enforced in a State court, where the premises have been seized by the marshal under forfeiture for illegal distilling, before the claim has been filed. The lienor should come into the United States court and prove his claim. A sale of the property under the forfeiture divests the lien and transfers it to the proceeds.<sup>4</sup>

§ 314. **When Jurisdiction is specially conferred.** — The statutes creating the lien generally define the courts which are to enforce it. It is of great importance in lien matters that a single court should have jurisdiction. Where many liens are against the same building, it would produce great confusion if different courts could enforce their judgments by executions against it.

<sup>1</sup> Canal Co. v. Gordon, 6 Wallace, McAll. 513; s. c. 6 Wall. 561; Brown v. 561. Pierce, 7 Wall. 205.

<sup>2</sup> Wharton on Conflict of Laws, § 321.

<sup>3</sup> Gordon v. South Fork Canal Co., 1 <sup>4</sup> Heidritter v. Elizabeth Oil-cloth Co., 6 Fed. Rep. 138.

Where the law is not clear in establishing a concurrent jurisdiction, courts will give such an interpretation as will do the least damage. Such an intention to consolidate jurisdiction has been said to be strongly indicated by the circumstance, that when the amount of the lien is within the ordinary jurisdiction of a justice of the peace, it is nevertheless authorized to be enforced in a circuit court, in which case the latter tribunal will take possession of the proceedings to the exclusion of the former.<sup>1</sup> If the jurisdiction has been specially conferred by name upon a court, it is no objection to its proceeding with the cause that the amount of the lien exceeds the sum limited as fixing the general jurisdiction of that court.<sup>2</sup> So, where the question of title to real estate is incidentally put in issue in an action to enforce this lien, in which jurisdiction is expressly conferred on the court, the jurisdiction is not thereby ousted.<sup>3</sup> The right of trial by jury will also be presumed to have been preserved, though the statute may not specially provide for it. The fair inference will be that this right is not taken away, unless it is so declared.<sup>4</sup> When the power to adjudicate the liens is given, and any special writ or form of proceedings is adopted to enforce them, the parties should conform their practice to the known and approved rules relating thereto. As where the lien was to be enforced by attachment in aid of the ordinary remedy suit, the attachment must follow it, and be issued from the same court which has jurisdiction of the demand, conforming at the same time to the usual conditions as to affidavit, bond, etc., on which attachments are usually issued. Any court having jurisdiction of the matter in litigation has power also to issue the attachment, as a justice of the peace, a circuit court, or court of chancery, conforming to its course of proceeding.<sup>5</sup>

§ 315. **When by Implication.**<sup>6</sup> — Whether a court has jurisdiction in cases where the statute does not expressly mention the tribunals in which they are to be brought, depends upon the general scope of jurisdiction of the court whose powers are invoked, and the essential characteristics of the particular lien. Thus, it was held that where "suit in all cases when the amount is over ninety dollars shall be brought in the circuit court," a

<sup>1</sup> *Platt v. Smith*, 28 Mo. 593.

<sup>2</sup> *Van Winkle v. Stow*, 23 Cal. 457.

<sup>3</sup> *Bourgette v. Hubinger*, 30 Ind. 296.

<sup>4</sup> *Richardson v. Warwick*, 8 Miss. 131.

<sup>5</sup> *Brown v. Brown*, 2 Sneed (Tenn.), 431; affirmed in *Hillman v. Anthony*, 4 Baxt. (Tenn.) 444. [For jurisdiction of the

Illinois Circuit Court in lien cases, see *Stout v. Sower*, 22 Ill. App. 65; for jurisdiction of Denver Superior Court, see *Weiner v. Rumble*, 11 Colo. 607.]

<sup>6</sup> This section was cited with approbation in *Waldroff v. Scott*, 46 Tex. 1.



proceeding by *scire facias* is so far a civil suit as to give that court jurisdiction.<sup>1</sup> Where a "circuit court shall have jurisdiction in all civil cases, the exclusive jurisdiction of which may not be vested in some other court," and justices of the peace have original exclusive jurisdiction in matters of contract, where the amount in controversy does not exceed \$100, cases of lien on land, being expressly excepted from their jurisdiction, the circuit court was held to have jurisdiction to enforce a mechanics' lien where the amount in controversy was less than \$100.<sup>2</sup> In another case, when the question was, if they were "actions at law on contract," and the statute itself denominated them personal actions, and they only arose out of contract, they were decided to come within the category above mentioned, although to a certain extent they proceeded *in rem*.<sup>3</sup> When the legislature liken these proceedings to proceedings upon issues joined and judgments rendered in other civil actions for the recovery of moneys, they must be deemed to intend civil actions for the recovery of money secured by liens upon property, in some manner resembling the liens of mechanics.<sup>4</sup> But where a court has jurisdiction only "in suits where the debt or damage claimed shall be over," etc., and the lien law declares that "every building shall be subject to a lien for the payment of all debts contracted for work," etc., and "the proceedings to recover the amount of any claim as aforesaid, shall be by writ of *scire facias*," to be enforced by "a writ of *levari facias* to be levied of the said building and lot of ground," this language does not create a suit for "debt or damage," and the court cannot entertain jurisdiction of the lien.<sup>5</sup> Its judgment would be *coram non judice*, and a sale thereunder by a sheriff inoperative and void.<sup>6</sup> So a suit for the foreclosure of a lien is not an action for the same cause as a suit at common law to recover personal judgment on a note, although the law authorizes the court rendering a judgment enforcing the lien to render also a personal judgment for the debt.<sup>7</sup> In California, where the lien was regarded as a sort of mortgage or security, which followed the original debt, it was held, without more explicit declaration, that it might be enforced on the chancery side of a court, precisely as any other species of mortgage or equitable lien.<sup>8</sup> So, when an owner is made responsible to contractors, sub-contractors, and others, to

<sup>1</sup> Hammond v. Barnum, 13 Mo. 325.

<sup>2</sup> White v. Millbourne, 31 Ark. 486.

<sup>3</sup> Marsh v. Fraser, 27 Wis. 596.

<sup>4</sup> Grant v. Vandercook, 57 Barb.

(N. Y.) 165.

<sup>5</sup> Miller v. Barroll, 14 Md. 173.

<sup>6</sup> Gelston v. Thompson, 29 Md. 595.

<sup>7</sup> Julian v. Pilcher, 2 Duv. (Ky) 254.

<sup>8</sup> Brock v. Bruce, 5 Cal. 279.

the extent of funds in his hands due under the contract, a suit in a court of chancery in the nature of a bill of interpleader might be entertained, when necessary to adjust the rights of the respective claimants.<sup>1</sup> In another case it was decided that although the remedy to enforce this lien was ordinarily at law, yet where the debtor was insolvent, and had left the State, a bill in equity would lie to enforce the lien; and creditors of the debtor might well be made parties to the bill to prevent circuity of action, and for the greater safety of all concerned.<sup>2</sup> But a court of equity is not authorized to extend a lien to cases not provided by statute.<sup>3</sup> In Georgia the county court has jurisdiction to foreclose a mechanics' lien on realty. It is not a suit respecting title to land.<sup>4</sup> The court of the county of the residence of the defendant in *feri facias* has jurisdiction.<sup>5</sup>

§ 316. **When Question of Lien is incidentally raised.** — Although a court has no jurisdiction in lien causes, yet where premises, or proceeds of their sale, are within its control, and which are subject to mechanics' liens, the court may so far take cognizance of them, during the pendency of actions for their enforcement, as to retain the property or money subject to the lien; and, when foreclosed in the proper tribunal, to order their discharge by payment.<sup>6</sup> So, where a court not having jurisdiction over the subject-matter has no power to render judgment against a defendant in respect thereto, yet the plaintiff, by bringing his proceeding in the court, submits himself and the decision of his claim to its jurisdiction; and it does not lie in his mouth, after bringing the defendant into court, compelling him to litigate the question of jurisdiction, and subjecting him to costs and expenses, to object that the court has not jurisdiction to render judgment for such costs, any more than it does to object that it has not power to decide the question of jurisdiction, which he has brought before it for determination, adversely to him, and on such decision render a binding judgment. Every court having jurisdiction over parties has adequate jurisdiction over them and the action, to determine the question of jurisdiction over the subject-matter when that question is raised; and that jurisdiction is sufficient to authorize a judgment for the costs

<sup>1</sup> *Lehretter v. Koffman*, 1 E. D. Smith, 664. How far a court of chancery may proceed on any principles of equity jurisdiction, see *Quimby v. Sloan*, 2 E. D. Smith, 594.

<sup>2</sup> *Foust v. Wilson*, 3 Humph. (Tenn.) 31.

<sup>3</sup> *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165.

<sup>4</sup> [*Wheatley v. Blalock*, citing *Strouper v. McCauley*, 45 Ga. 74; *Porter v. Wilder*, 62 Ga. 621.]

<sup>5</sup> [*Akin v. Peck*, 64 Ga. 643.]

<sup>6</sup> *Noyes v. Burton*, 17 How. Pr. (N. Y.) 449.

incurred in the determination of the question against the party invoking the aid of the court.<sup>1</sup> When jurisdiction is acquired, the proceedings for the enforcement of this lien, as in other actions, are final, and cannot be impeached collaterally.<sup>2</sup>

§ 317. **Justices of the Peace.** — Where a statute evidently contemplates all the proceedings to be had in a court of record to enforce the lien, justices of the peace have no jurisdiction of the process to enforce it;<sup>3</sup> and this, though the sum claimed may in amount be within their jurisdiction. Some other circumstance, in addition to amount, must indicate their right to proceed.<sup>4</sup> So, to grant jurisdiction to a court of record in matters of lien, as to sums over which justices of the peace exercise general jurisdiction, is an implied exclusion of their right to determine such actions.<sup>5</sup> Parties recovering only a sum for which the latter have jurisdiction would nevertheless be entitled to costs.<sup>6</sup> So, where the lien is to be enforced "by filing a bill in chancery," it is not embraced by "justices of the peace shall have jurisdiction to try and determine suits founded on contract or tort, when the debt or damages claimed, or the value of the property sought to be recovered, does not exceed one hundred dollars."<sup>7</sup> Where the legislature gave justices of the peace jurisdiction in all cases under fifty dollars, the fact that it failed to provide for bringing in non-residents when enforcing the lien does not give a circuit court jurisdiction.<sup>8</sup> In Arkansas a justice of the peace has no jurisdiction to enforce or protect a lien on *real* estate, such as a mechanics' or material-man's lien for labor or materials put into a building.<sup>9</sup> In North Carolina a justice of the peace has sole jurisdiction of a lien suit under \$200.<sup>10</sup>

§ 318. **Difference in Pleading in Courts of General and Limited Jurisdiction, as regards Jurisdiction.** — The jurisdiction of a court depends on the form of the action and allegations of the petition, and not on the facts proved.<sup>11</sup> In courts of general jurisdiction, everything is presumed in their favor, and it is not necessary that it should appear by the record that the incipient proceedings to create a lien were ever taken.<sup>12</sup> Local courts and courts of inferior jurisdiction must keep within the prescribed powers of

<sup>1</sup> *Donnelly v. Libby*, 1 Sweeny (N. Y.), 259.

<sup>2</sup> *Maltby v. Greene*, 1 Keyes (N. Y.), 548.

<sup>3</sup> *Noss v. Cord*, 1 Wis. 389.

<sup>4</sup> *Myer v. Gleisner*, 7 Wis. 55.

<sup>5</sup> *Platt v. Smith*, 28 Mo. 593.

<sup>6</sup> *Albers v. Eilers*, 18 Mo. 279.

<sup>7</sup> *Ainsworth v. Atkinson*, 14 Ind. 538.

<sup>8</sup> *Stamps v. Bridwell*, 57 Mo. 24.

<sup>9</sup> [*Cotton v. Penzel, &c. Co.*, 44 Ark.

484.]

<sup>10</sup> [*Smaw v. Cohen*, 95 N. C. 85.]

<sup>11</sup> *Patrick v. Abeles*, 27 Mo. 184.

<sup>12</sup> *Maltby v. Greene*, 1 Keyes (N. Y.), 548.

their creation; and where their judgments are called in question, the record should show affirmatively all the facts necessary to give the court jurisdiction, both of the subject-matter of the suit and the parties to it. As where an inferior and local court, possessing only limited jurisdiction, "with jurisdiction to enforce mechanics' lien in K. county," it is a fatal defect if the proceedings do not show that the property on which the lien was sought to be enforced was situated in K. county.<sup>1</sup> So, if a lien must be filed "within ninety days after the work and labor done or materials furnished," and on the face of the petition it appeared that it was not filed for nearly six months after the things were furnished and work done, the court had no jurisdiction to try the lien, and its judgment was a nullity.<sup>2</sup>

§ 319. **Amount to give Jurisdiction.** — Frequently the statute securing the lien makes it necessary that the claim against the property should amount to a certain sum in order to be enforceable by, or to give jurisdiction to, a particular court. All depends upon the language of the statute. Thus, under a law which gave a lien "whenever a debt, amounting to fifty dollars or upwards, shall be contracted," it was said, whether the debt is secured by lien or not must be determined by its condition when contracted, that is, when the services are rendered or the supplies furnished, and no regard can be had to the state of the debt at any subsequent period to that time. If the debt were not a lien when it was created, it cannot become such subsequently; and, therefore, a debt of forty-nine dollars, which, by the accumulation of interest, amounted to more than fifty dollars at the time suit is brought, will not give a lien.<sup>3</sup> It is sufficient, however, if the amount in the aggregate reach that sum and not that each item shall equal that amount.<sup>4</sup> The principles on which the lien is given are those of equality among the claimants, and the policy of the courts, when the statutes would permit, has been to consider all the claims of mechanics, and of one mechanic against several premises of the same owner, as an entirety, for the purpose of giving jurisdiction. For example, an act which provided for the apportionment of the claims of mechanics among several houses built for the same owner, and that a district court should have jurisdiction "of all joint claims against two or more buildings owned by the same person, etc.; wherein such mechanics and others claim a sum equal to

<sup>1</sup> Schell v. Leland, 45 Mo. 289.

<sup>2</sup> Stebed v. Stock, 31 Mo. 456.

<sup>3</sup> The Stephen Allen, 1 Blatchf. & H.

<sup>4</sup> The St. Mary, 2 Blatchf. C. C. 329.

that of which said court has jurisdiction, notwithstanding the several apportioned claims therein be less than the sum of which said court has jurisdiction," which was one hundred dollars, — it was decided that where a claim was filed for a sum exceeding that amount, but so apportioned amongst several buildings as to make the lien against each less than one hundred dollars, in determining the question of jurisdiction, the claim was to be considered as an entirety, and the jurisdiction of the district court was sustained. If the court, however, should have no jurisdiction, the proper course would be to order the claim to be stricken from the record as a nullity.<sup>1</sup> But in another case it was held that where the constitutional limitation of a county court was two thousand dollars, the extent of the jurisdiction to enforce lien claims is to be measured by the amount involved in each claim severally, and not the aggregate of all the claims presented against the same property. Where no one claim exceeds two thousand dollars in amount, any number of claims may be adjudicated in the same proceeding.<sup>2</sup>

*Jurisdiction of the parties:—*

§ 320. **Notice.** — It is a general principle, founded in reason and justice, that if a defendant have no notice of the suit, and does not appear, the court has no jurisdiction, and its judgment against him in such case is simply void.<sup>3</sup> Notice is of two kinds, — actual or constructive. Actual notice to the owner by service of the appropriate process to bring parties defendant into court has always been held sufficient to give jurisdiction to enforce the lien.<sup>4</sup> And in those States where, in an action by a sub-contractor or material-man against an owner to enforce the lien, the contractor may be joined as a party defendant for the purpose of enforcing the claim of general indebtedness arising out of the sub-contract, service of process against the owner alone gives the court jurisdiction; and if the court has power to cause other parties to be brought into the cause, the case should not be dismissed, but the contractor brought in.<sup>5</sup> The service of notice of claim of lien gives no jurisdiction over the person of parties, and is not to be confounded with the service of regular process of the pendency of suit.<sup>6</sup> The notice must in all cases

<sup>1</sup> Woodruff v. Chambers, 13 Penn. St. 259; Maltby v. Green, 1 Keyes (N. Y.), 132; Curry v. Spink, 23 Penn. St. 58. 548.

<sup>2</sup> Keystone v. Gallagher, 5 Colo. 23.

<sup>3</sup> Brown v. Brown, 2 Sneed (Tenn.), 415; s. c. 2 E. D. Smith, 577.

<sup>4</sup> 431; Meyers v. Le Poidevin, 9 Neb. 536.

<sup>5</sup> Donnelly v. Libby, 1 Sweeny (N. Y.), 259.

<sup>6</sup> Donnelly v. Libby, 1 Sweeny (N. Y.),

be such as is contemplated by the statute, otherwise it would be null. As where a notice of lien required a party to appear in the supreme court, before the clerk of the court, and there account for a sum less than it had jurisdiction over, when it should have been before a justice's court, a judgment entered in the supreme court by default against the defendant was void.<sup>1</sup> Due notice of the time and place of condemnation is essential to the validity of proceedings *in rem*. The owner must have an opportunity to contest the validity of the lien and the amount due.<sup>2</sup> Failure to give reasonable notice to the owners would not render the writ of attachment void, but no judgment could be given that would be valid against *them*.<sup>3</sup>

§ 321. **Non-residents; Constructive Notice.** — The lien of the mechanic operating primarily as a charge against land over which a State and its courts have complete control, jurisdiction for its enforcement may be obtained by constructive notice, although the defendants be non-residents and actual notice be not given.<sup>4</sup> The law, from necessity, imposes on all parties possessing real property within foreign jurisdictions the duty of informing themselves of the *leges rei sitæ*, and such public acts as by them are constituted notice of proceedings in their courts of justice.<sup>5</sup> Thus, where a statute provides for a public notice to all persons of the sale under a mechanics' lien, and reserves a right of redemption, subsequent mortgagees must take notice, and watch the proceedings at their peril. They stand in this respect much like a subsequent mortgagee after a prior mortgage. He must take notice of the entry of the prior mortgagee for condition broken; and if the time of foreclosure has nearly expired at the time he takes his mortgage, he must ascertain at his peril, and offer to redeem accordingly.<sup>6</sup> But it is just as essential to the validity of a judgment *in rem* that constructive notice should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. For a proceeding professing to determine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court.<sup>7</sup> This constructive notice, which is now usually made by publica-

<sup>1</sup> Dressel v. French, 7 How. Pr. (N. Y.) 350.

<sup>2</sup> [Reilly v. Stephenson, 62 Mich. 509; Streeter v. McMillan, 74 Mich. 123.]

<sup>3</sup> [Reilly v. Stephenson, 62 Mich. 509.]

<sup>4</sup> Guerrant v. Dawson, 34 Miss. 149.

<sup>5</sup> M'Kim v. Mason, 3 Md. Ch. D. 186.

<sup>6</sup> Howard v. Robinson, 5 Cush. (Mass.) 119.

<sup>7</sup> M'Kim v. Mason, 3 Md. Ch. D. 186.

tion in newspapers, must be authorized by law, otherwise it will be a nullity. Thus, where publication was made in a lien case, without any statute to justify it in such suits, a judgment by default, notwithstanding a publication, was void.<sup>1</sup> In cases where constructive notice is substituted for actual notice, strict compliance with the statute is required. If, for example, a mechanics' lien may be enforced against non-residents, by publication, the order for which is to be granted on petition, stating that defendants are non-residents, this fact must be set out; or, if publication may be granted "by the court," after a return by the sheriff of "not found," and it is granted by the clerk in vacation, the publication is also a nullity.<sup>2</sup> Again, where personal service of a lien petition is necessary, when the defendant can be found in the county; if not to be found in the county, notices posted on the buildings subject to the lien is a sufficient service: it must, when the latter course is adopted, affirmatively appear from the return of the officer that the defendant could "not be found." The sheriff might have seen the defendant every day while the writ was in his possession, and still the defendant may never have known of the pendency of the suit. When debtors abscond, they must at their peril ascertain whether notices have been posted upon buildings they have recently erected, but not so where they remain constantly in the county.<sup>3</sup> In another case, the officer was held to have made a proper return and publication by "served by copy on A., one of the defendants, and by putting up a copy in front of the building, and *nihil* as to B., the other defendant," under a law which provided "that the *scire facias*, etc, shall be served in the same manner as a summons upon the party named, if he can be found within the county," etc., but if he cannot be found, and the premises are not occupied, "it shall be the duty of the sheriff to affix a copy of such writ upon the door or other front part of such building."<sup>4</sup> When a publication has not been authorized by law, or is otherwise invalid, the party defendant may make a motion to arrest or set aside the judgment. An appearance for that special purpose constitutes no waiver of any valid objection which he had to the defective process and service. A party who is in court for one purpose is not necessarily in court for any other purpose.<sup>5</sup>

<sup>1</sup> Falconer v. Frazier, 15 Miss. 235.

<sup>2</sup> Schell v. Leland, 45 Mo. 289.

<sup>3</sup> Colcord v. Funk, 1 Morris (Iowa),

<sup>4</sup> Donahoo v. Scott, 12 Penn. St. 45.

<sup>5</sup> Schell v. Leland, 45 Mo. 289; Fal-

coner v. Frazier, 15 Miss. 235.

## CHAPTER XXIX.

## TIME WITHIN WHICH LIEN MUST BE PROSECUTED.

§ 322. **Necessity for Prompt Enforcement.** — It has been the policy of nearly every State which has established a system of mechanics' lien to protect the rights of owners and others who may become interested in the property, by requiring those who are entitled to its benefits to be prompt in the enforcement of their claims. The privileges secured mechanics and materialmen are unusual in their character, effective and sometimes oppressive in their behalf, and it is only just that they should be required to be diligent in their enforcement. Loss would otherwise frequently follow to purchaser, creditor, and owner, if they were not thus protected, and sales of property seriously embarrassed. This lien is essentially different from the common-law lien of the mechanic on chattels, which continues only while possession lasts, notice of claim being inferred therefrom. On the contrary, it is effective without possession, when the property is in the actual occupancy of the owner, and where there is nothing of record to give notice of the claims which may be filed, except the recency of the improvement or repairs, which latter in many cases is uncertain, and in some instances, particularly of repairs, no notice whatever. Statutes accordingly have specifically designated certain short periods in which the notice of the claim should be filed among the public records, or suit brought for its enforcement.<sup>1</sup> So essential and highly salutary are such enactments considered that these provisions in a previous law will not be considered as repealed, or the parties left to be governed by the general statute of limitations of actions, unless by express words or manifest intent.<sup>2</sup> A general statute of limitations was held not to apply to liens where limitations for the enforcement of the latter were provided for in the mechanics' lien law.<sup>3</sup> So, where the lien on special structures — as wharves — was provided for by a special act, the remedy

<sup>1</sup> *Lewis v. Morgan*, 11 Serg. & R. 234.

<sup>2</sup> *Clark v. Manning*, 4 Bradw. (Ill.)

<sup>3</sup> *Gilson v. Emery*, 11 Gray (Mass.), 649.  
430.



and time therein stated, within which the lien was to be prosecuted, has to be followed, although filed within the time prescribed by the general lien law.<sup>1</sup> Again, where a law was repealed prescribing the time within which the lien was to be prosecuted, and the provisions of a prior law were revived, it was held that a mechanic filing his lien according to the requirements of the latter act was entitled to enforce his lien.<sup>2</sup> The limitation of the period in which suit may be brought is a matter exclusively for legislative enactment; and where by the terms of the law no limitation in point of time is fixed upon the right of the creditor to enforce the lien created by it, a delay to institute proceedings does not invalidate the lien.<sup>3</sup> So, where no time is fixed by the statute for the commencement of proceedings to enforce a lien, a petition may be sustained for that purpose though not commenced for more than two years after the completion of the work.<sup>4</sup> It would probably be held, however, inasmuch as the lien depends upon the debt arising out of the performance of the contract, that even in those cases where no time is fixed for bringing the action, when the debt is barred by a statute of limitations the lien would be considered as waived or lost.

§ 322 *a*. **Lien is lost, when Time has expired.** — Where a definite period is mentioned in the statute within which the proceedings to enforce the lien must be commenced, if the claimant of lien does not conform thereto, his right of lien will be lost, unless there is some special provision of statute saving him from his own laches. Illustrating this proposition it has been held that where notice must be filed “within sixty days after the completion of the building,” it is essential,<sup>5</sup> and this fact must be affirmatively shown by the party seeking to enforce the lien.<sup>6</sup> The lien of sub-contractor cannot be created outside of the statute, or extended beyond its terms. Accordingly, where he must give notice of his claim of lien within a certain time, and he does not, he will have no lien.<sup>7</sup> In Nebraska a sub-contractor must file his lien within sixty days, and a contractor within four months, or the lien will die.<sup>8</sup> Where a lien had to be prosecuted

<sup>1</sup> Collins v. Drew, 67 N. Y. 149; s. c. 6 Daly (N. Y.), 234.

<sup>2</sup> Phillips v. M. O. Mason, 7 Heisk. (Tenn.) 61.

<sup>3</sup> Garrett v. Stevenson, 8 Ill. 261.

<sup>4</sup> Busfield v. Wheeler, 14 Allen (Mass.), 139.

<sup>5</sup> City of Crawfordville v. Brundage, 57 Ind. 262.

<sup>6</sup> Killian v. Eigenmann, 57 Ind. 480.

<sup>7</sup> Nat. Stock Yards v. O'Reilly, 85 Ill.

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<sup>8</sup> [Hoagland v. Van Etten, 22 Neb. 682, 687; Howell v. Wise, 28 Neb. 761; McPhee v. Kay, 30 Neb. 62; Millsap v. Ball, Id. 728.]

within sixty days by attachment, and the attachment turned out to be invalid by reason of defects therein, the lien was lost.<sup>1</sup> When the time in which a lien should be filed has expired, the mechanic cannot enforce it against an innocent purchaser, although the vendee took the property under a bond for a deed, and made no actual payment, but simply executed his note for the purchase price.<sup>2</sup> The lien, when not filed within the statutory period, will not prevail over liens of intervening creditors.<sup>3</sup> But a party is not in default if he files his claim at any time within which the law allows it to be done.<sup>4</sup> Where a claim for materials furnished in the construction of a vessel was filed under Gen. Sts. c. 151, §§ 12, 13, four days after the vessel departed from the furnishing port, a petition filed four and a half years thereafter is in time, though the vessel has been in the port several times in that period to the knowledge of the plaintiff.<sup>5</sup> It is only necessary that the suit should be begun within the period named for holding the lien, by filing an account; where the law says the claimant may "proceed to obtain judgment, and enforce the same" within said period, the meaning is only that the proceedings shall begin within the period, the judgment may be rendered afterward.<sup>6</sup> A lien ceases to bind the property after the expiration of ninety days from the time the claim is filed, unless the lienor within that time either commences an action to enforce the lien, and files a notice of pendency of the action, or unless he within that time be made a party to an action to enforce "any other lien," and in that action a notice of pendency is filed by him or in his behalf. The words "any other lien" are not confined to other mechanics' liens, but include as well a lien by mortgage.<sup>7</sup> In Georgia suit must be brought on a contractor's lien within twelve months after its record. And a seizure of the railroad by the State is no excuse for delaying suit.<sup>8</sup> In Connecticut notice must be given to the owner by the claimant "within sixty days from the time he shall have *commenced* to furnish materials or render services." And when B. furnishes materials from time to time from May 1st to Oct. 1st, and on Oct. 9th gave notice to the owner, it was held that he had no lien even for the materials furnished since Aug. 11th.<sup>9</sup> A

<sup>1</sup> Bryant v. Warren, 51 N. H. 213.

<sup>2</sup> Weston v. Dunlap, 50 Iowa, 183.

<sup>3</sup> Lunt v. Stevens, 75 Ill. 507; Huntington v. Barton, 64 Ill. 502; Schneider v. Kolthoff, 59 Ind. 568.

<sup>4</sup> Hart v. Mullen, 4 Colo. 514.

<sup>5</sup> [McDonald v. The Nimbus, 137 Mass. 360.]

<sup>6</sup> [North Star Iron Works Co. v. Strong, 33 Minn. 1, 8.]

<sup>7</sup> [Danziger v. Simonson, 116 N. Y. 329.]

<sup>8</sup> [Cherry v. R. R., 65 Ga. 633.]

<sup>9</sup> [Hill v. Mathewson, 56 Conn. 323, 329 *et seq.*]

delay of suit for six years after recording the lien bars the action for foreclosure.<sup>1</sup> In Iowa, foreclosure suit must be brought within thirty days after notice from the owner to the material-man, calling upon him to bring suit. And the appearance of the owner in answer to suit brought too late is no waiver of the right to make this defence.<sup>2</sup> There is also the usual limitation running from the completion of the work. If a sub-contractor delays filing his lien more than thirty days after he completed his work, he can claim no lien if the owner has paid the contractor in full.<sup>3</sup> If the statute of limitations is not pleaded in a suit against the proper parties to foreclose the lien, it cannot be set up in a collateral proceeding.<sup>4</sup> When the lien accrues under one law the passage of a subsequent law will not cut down the time within which suit may be brought.<sup>5</sup> A complaint that shows on its face that the statement of lien was not filed within the statute time is demurrable.<sup>6</sup> If the lien is filed within thirty days, it is immaterial that it is not recorded until after that time.<sup>7</sup> When the objection to the time of filing notice has been waived by the defendant in the lower courts he cannot raise it on appeal.<sup>8</sup> Under the mechanics' lien law of 1875, which is applicable to the city of New York, a notice of *lis pendens* filed on the ninety-first day after notice of lien, though the ninetieth day fell on a Sunday, is of no effect, and the person filing his *lis pendens* has no standing in court as a lienor.<sup>9</sup>

§ 323. **When Limitation commences.**<sup>10</sup> — To determine when the time mentioned in the statute for filing the claim or instituting proceedings begins to run, depends largely on the character of the contract under which the labor was performed or materials furnished. For example, where a mechanics' lien law provides that "every such debt shall be a lien as aforesaid, until the expiration of six months after the work shall have been finished or materials furnished, but such lien shall not continue longer than the said period of six months, unless a claim be filed at or before the expiration of the same period," and the delivery of materials is in pursuance of an entire contract, the lien limitation does not begin to run until the contract is performed.<sup>11</sup> So

<sup>1</sup> [Hills v. Halliwell, 50 Conn. 270.]

<sup>2</sup> [Jones & M. Lumber Co. v. Boggs, 63 Iowa, 589.]

<sup>3</sup> [Hug v. Hintrager, 80 Iowa, 359.]

<sup>4</sup> [Welch v. McGrath, 59 Iowa, 519.]

<sup>5</sup> [Nystrom v. London, & Co. Mortg. Co., 47 Minn. 31.]

<sup>6</sup> [Alesina v. Stock, 8 Mont. 416, 418; Alvord v. Hendrie, 2 Mont. 115, 122.]

<sup>7</sup> [Bassett v. Brewer, 74 Tex. 554.]

<sup>8</sup> [Phoenix Iron Co. v. The Richmond, 6 Mackey (D. C.), 180.]

<sup>9</sup> [Bowes v. New York Christian Home, 64 How. Pr. 509.]

<sup>10</sup> [Approved in Crawford v. Blackman, 30 Kan. 527.]

<sup>11</sup> Bolton's Appeal, 3 Grant Cas. (Penn.) 204; Edwards v. Derrickson, 4 Dutch. (N. J.) 39.

a party who works or furnishes materials under an entire contract, which may not be wholly finished for years, has no claim in fact or in law until the contract has been performed. He cannot divide his claim into parcels and file separate liens. He must wait until the contract is completed; for, where the bargain is for a gross sum, he can fix no price upon particular parts of the work, and therefore, under such an act, the time for filing a claim does not begin to run until after the date of the last act done in execution of the contract, — that is, when the contract is for materials, after the delivery of the last quantity required to complete the contract.<sup>1</sup> Where, pending the erection of a building, the owner ceases work and loses title, and the party acquiring the title proceeds with the work as regularly as the prior owner, and completes the building commenced by such owner, a contractor under such owner cannot elect to consider the building completed at the time of the transfer of title, and file his lien accordingly.<sup>2</sup> So, if a mechanic may file his lien at any time within one year from the time the work is finished, and the building contract is entire, the work is not considered as done, or the materials furnished, until the contract is executed, and a mechanic is not obliged to file lien claims from week to week as the work progresses.<sup>3</sup> So, where a party furnishes materials for a building at different times, but in pursuance of one contract, he is in time if he commence proceedings to establish his lien within the period allowed by the statute, counting from the date of the last act done in execution of the contract. As where persons made a contract in May, 1857, with machinists, for all the machinery and materials required to build a mill, and received them all at that time except the bolting-cloth, it being uncertain what kind of cloth would be needed, they informed the machinists they would order it from them afterwards, which was done, and received in the following September. The machinists commenced proceedings to enforce their lien within the statutory period counting from the last item, but not if from the former; and it was held that, as the cloth had been furnished under the same contract as the other materials, the proceedings were commenced in time to enforce the lien for the whole amount of materials furnished.<sup>4</sup> So, where in the fall of 1867 plaintiffs contracted with W. to furnish him lumber for the erection of a new dwelling-house, and

<sup>1</sup> Bartlett v. Kingan, 19 Penn. 341 ;  
Pratt v. Campbell, 24 Penn. 184 ; Shaffer  
v. Hull, 2 Penn. L. J. 93.

<sup>2</sup> Perry v. Conroy, 22 Kan. 716.

<sup>3</sup> Derrickson v. Edwards, 5 Dutch.  
(N. J.) 468.

<sup>4</sup> Fowler v. Bailley, 14 Wis. 125.

the repair of an old one, and they commenced furnishing lumber for that purpose the same season, and continued doing so until the last day of 1868. In August, 1868, W. became owner of a second lot immediately adjoining that first mentioned, and removed the old house upon it, and made the repairs on said house in the spring of 1869. In that spring, also, the contract for lumber was enlarged, by plaintiffs agreeing to furnish lumber to build a barn. It was held that for the purpose of enforcing the lien against W. it was but a single contract for the whole lumber, and the time within which it should be enforced was to be counted from the last delivery; but as to mortgagees who had taken mortgages in the intervals, there could be no modification of the original contract to their prejudice, and the lien-holders were postponed to them in accordance with their several dates.<sup>1</sup> Where the law allows ninety days for filing a lien, and ninety days after filing in which to bring suit, and a good lien is filed, the second ninety days begins to run, and the time cannot be extended by amending or filing a new lien, though within the original ninety days.<sup>2</sup> The provision of the mechanics' lien law, that the time of issuing the summons to enforce the lien shall be endorsed on the claim within one year after the date of the latest item in the claim, or within thirty days after due notice from the owner to the claimant to sue, is mandatory, and in case of non-compliance with it the lien will be discharged according to the terms of the statute. The powers of amendment conferred on the courts by the act do not enable them to restore the lien when it has been discharged by non-compliance with this mandate. When a claimant has been notified by an owner to sue within thirty days, he cannot escape the obligations arising from the notice by thereafter filing a new claim for the same debt. The first claim was not a nullity; for at the worst it was capable of becoming by amendment under the act, a perfect claim. Its filing, therefore, gave the owners the right to serve the statutory notice, and by their compliance with the law in that particular, the claimant became bound to have the summons issued for enforcing the lien, and due entry thereof made within thirty days. This obligation he could not escape by filing a second claim.<sup>3</sup> In Iowa suit must be brought within thirty days after notice from the owner, or within two years after the expiration of the ninety or thirty days allowed

<sup>1</sup> Chapman v. Wadleigh, 33 Wis. 267.

<sup>3</sup> [Wheeler v. Almond, 46 N. J. L.

<sup>2</sup> [Battle v. McArthur, 49 Fed. R. 161, 166.]  
715.]

for filing a statement, and this is true whether a statement is filed within that time or afterward, or is never filed.<sup>1</sup> Where the law provided that an affidavit must be filed within thirty days after furnishing material, if not the lien should cease as to all persons except the owner, and that suit should be brought within sixty days after filing the affidavit, it was held that where no affidavit is filed, suit must be brought within ninety days after furnishing the material.<sup>2</sup>

§ 323 *a*. **No Lien, when Claim is filed too soon.**<sup>3</sup> — One who would create and enforce a mechanics' lien upon a building, must proceed according to statute, and if he commences before the time allowed, as well as after, no decree foreclosing the lien will be awarded.<sup>4</sup> Thus, where a claimant "shall give ten days' notice before filing of the lien," and the notice was given on the 8th of August, and the suit was brought August 16th, the lien failed.<sup>5</sup> Where the statement for a lien "shall be filed within four months after the completion of the building," and it was filed before it was completed, it is not sufficient to create a lien, as the party does not bring himself fairly within the terms of the statute.<sup>6</sup> When the statute says the lienor must file his claim "within thirty days after the completion of the building," a lien filed before such completion is premature and of no avail.<sup>7</sup> Where the defendant agreed to pay when the building was completed, a foreclosure of lien cannot be made before the building is done. The debt must be due on which the lien is based before there can be a foreclosure.<sup>8</sup> But if the owner originally intended to erect the building only in part, or if he abandons the completion of it, the termination of work from such cause will be held the "completion of the building" within the meaning of the statute.<sup>9</sup> So, where the lien is given after the debt becomes due, no lien can be filed on a contract for the delivery of materials until the last parcel of them are supplied; and the lien is filed, in such case, in time, although the last item is the only one furnished within the statutory limitation.<sup>10</sup> So, where a provision is made that any person having filed a lien may "in

<sup>1</sup> [Squier v. Parks, 56 Iowa, 407, 409; Jones & M. Lumber Co. v. Boggs, 63 Iowa, 589.]

<sup>2</sup> [Comstock v. McEvoy, 52 Mich. 324.]

<sup>3</sup> See § 323.

<sup>4</sup> Perry v. Conroy, 22 Kan. 716.

<sup>5</sup> [Leih v. Engelhardt, 78 Ala. 508; Phillips, § 338, cited with approval.]

<sup>6</sup> Conroy v. Perry, 26 Kan. 472.

<sup>7</sup> [Roylance v. San Luis Hotel Co., 74 Cal. 273, 277; Schwartz v. Knight, 74 Cal. 432; Davis v. Bullard, 32 Kan. 234; Seaton v. Chamberlain, 32 Kan. 239; Catlin v. Douglass, 33 Fed. R. 569.]

<sup>8</sup> [Harmon v. Ashmead, 60 Cal. 439.]

<sup>9</sup> [Schwartz v. Knight, 74 Cal. 432; see § 362 *a*; Harmon v. Ashmead, 68 Cal. 322.]

<sup>10</sup> *In re Hill's Estate*, 2 Penn. L. J. 96.

ten days thereafter " institute a proceeding to enforce it, the law does not require, but prohibits, the commencement of a proceeding within ten days.<sup>1</sup> It may therefore be stated as a general principle that, unless allowed by statute, no action can be brought for the enforcement of a lien before the debt becomes due, the payment of which it is designed to secure. An action may be previously brought to prevent a destruction or removal of the property to which the lien attaches that might endanger the security; but not an action for the sole purpose of enforcing the debt.<sup>2</sup> But when the completion of the work is prevented by the owner, and not through any default of the mechanic, the latter will not thereby be prevented from filing his lien. A right of action in such case arises for the work done, and for such the lien is enforceable. Thus, where a building which was nearly finished was suspended, and the architect had completed certain plans and specifications under an agreement to receive what they were reasonably worth, and during the suspension he filed a lien, computed with reference to the cost of the building exclusive of what remained to be done on it at the time when the claim was filed; the claim was not premature, as the suspension of the work, without any fault on his part, should not have the effect to deprive him of his lien, or to postpone his right to the remedy provided by the lien law.<sup>3</sup> So, if a statute provide that "the lien shall not be in force more than six months from the time when the money, or the last instalment of the money, to be paid under the contract shall become payable, unless a suit in equity to enforce the lien shall have been commenced within the said six months," the suit may be brought within six months from the time the building is finished, to enforce the lien as to the instalments of the contract price which are due; and though some of them are not due and payable at the time the suit is commenced, the court may in its decree provide for them, — in other words, it does not compel him to wait until all the instalments are due.<sup>4</sup> In another case it was held that where there is an entire contract but one lien can be claimed; and a contractor cannot, because payments are due from time to time, file successive liens as they fall due.<sup>5</sup> In Nebraska the law provides that "the owner shall not be liable to any action by the contractor until the expiration of the said sixty

<sup>1</sup> *Darrow v. Morgan*, 65 N. Y. 333.

<sup>4</sup> *Iaeger v. Bossieux*, 15 Gratt. (Va.)

<sup>2</sup> *Pryor v. White*, 16 B. Mon. (Ky.) 83.

605.

<sup>5</sup> *Cox v. West P. R. R. Co.*, 47 Cal.

<sup>3</sup> *Knight v. Norris*, 18 Minn. 473.

87.

days," that is, the sixty days allowed sub-contractors for filing their liens.<sup>1</sup>

§ 324. **When Work is done under Distinct Contracts.**<sup>2</sup> — It thus appears that the whole work done under one contract or one request creates one indivisible lien; but when work is done under several contracts or requests, each separate job is entitled to a separate lien, so that when notice in the latter cases has to be filed within a certain time after the work is performed, a notice embracing an account for work extending back beyond that period, that portion of the work which has been done within the limitation will be protected, and the portion done prior to that time will be unprotected.<sup>3</sup> So, if materials be furnished under distinct contracts, each must stand on its own merits, and the lien must be filed under each contract within the time limited.<sup>4</sup> It is permissible to embrace in an account filed as a lien, items for work on the same building under different contracts with the owner, but, in order to enforce the lien for the entire work, the evidence must show that the lien was filed within six months after the completion of the work under each contract.<sup>5</sup> Under a continuous contract the original contractor may file his lien within six months from the date of the last item of the account. If the items were furnished under separate contracts the lien must be filed within six months from the date of the last item under each independent contract.<sup>6</sup> Thus, where a lien was filed for materials supplied at different periods within the previous two years, in the absence of a special contract, no lien existed except for the materials furnished within six months prior to the filing of the lien.<sup>7</sup> Where no time of payment for materials is fixed by the contract, the price becomes due and payable as soon as the delivery is completed; but where a uniform custom on the part of the contractor to demand payment at the close of each month is shown, and such custom was known

<sup>1</sup> [Millsap v. Ball, 30 Neb. 728, 733.]

<sup>2</sup> This section was cited with approbation in *Merchant v. Ottumwa*, 54 Iowa, 455; [Farnham v. Davis, 79 Me. 283; 285; Crawford v. Blackman, 30 Kan. 527.]

<sup>3</sup> Sweet v. James, 2 R. I. 270.

<sup>4</sup> Livermore v. Wright, 33 Mo. 31.

<sup>5</sup> [Kern v. Pfaff, 44 Mo. App. 29.]

<sup>6</sup> [Page v. Bettes, 17 Mo. App. 366.]

<sup>7</sup> Phillips v. Duncan, 3 Am. Law Reg. 304; s. c. 1 Pittsb. 195. To change the law as thus laid down, the act of April 4, 1855, was passed, enacting that "when- ever the items of a mechanic or material-

man's bill, for work done or materials furnished continuously towards the erection of any new building, are in any part *bona fide*, within six months before the filing of the claim therefor, the lien shall be valid for the whole." Under this statute, it has been held that where there is evidence that work and materials were furnished for the same building, or for the same contractor, in the ordinary progress of the work, and from time to time as they were needed, it should be submitted to the jury, if any of the items were within six months of filing of the claims. *Singerly v. Doerr*, 62 Penn. 9.



to the other, there arises by implication an understanding between the parties that credit should be given until the close of each month.<sup>1</sup> So, a mere general agreement "to pay for such materials as thereafter should be furnished," under a lien law by which proceedings are to be commenced "within three months after the work is done or materials furnished for which a lien is sought," makes this limitation apply to each item, as of the date of its delivery.<sup>2</sup> Where the time for filing lien dates from the last item furnished, and, in the absence of an express contract, materials are furnished for separate and distinct purposes, or at different times, and at considerable intervals, or under distinct contracts or orders, though to be used by the contractor or builder in executing one and the same contract with the owner, the right to take the lien must date from the time of furnishing the different parcels of material, and not from the last item of the account.<sup>3</sup> So, one single lien cannot cover several distinct alterations in the same building, made at different times and independent of each other, and the time within which each lien must be enforced must be computed from each alteration.<sup>4</sup> Nor can two distinct accounts or contracts of a material-man be tacked together to make a continuous account or contract; the lien for each must be taken within the statutory period.<sup>5</sup> When a lien arising from one contract is lost by failing to file notice in time, it cannot be saved by tacking it on to a subsequent distinct contract, under which notice was properly filed.<sup>6</sup> As where a contractor agreed, in May, 1853, to erect a building according to specifications, to be completed in September following; but, with the exception of making the doors, performed no labor until the fall of 1857, when another written contract, materially different, was entered into, containing stipulations inconsistent with those of the former, but complete in itself. Under such circumstances the latter contract was not a supplement to the former, but a new and independent contract, and a lien under the latter would not protect work done under the first contract.<sup>7</sup> So, where a mechanic, under an agreement with the contractor, did work by the day, from Jan. 22 to March 5, and again from April 8 to April 19, and filed his lien on May 11,

<sup>1</sup> Phoenix Mut. Ins. Co. v. Batchen, 6 Bradw. (Ill.) 621.

<sup>2</sup> Hubbell v. Schreyer, 14 Abb. Pr. N. S. (N. Y.) 284.

<sup>3</sup> Trustees Ger Luth. Ch. v. Heise, 44 Md. 454; Watts v. Whittington, 48 Md. 353.

<sup>4</sup> Baker v. Fessenden, 71 Me. 294.

<sup>5</sup> Hazard Powder Co. v. Loomis, 2 Disney (Cin.) 544.

<sup>6</sup> [Farnham v. Davis, 79 Me. 283, 285, citing Phillips, § 324.]

<sup>7</sup> Cocheco Bank v. Berry, 52 Me. 293.

by which he claimed a lien for wages for the whole time he worked, it was held he was entitled to a lien for only the work done during the thirty days next preceding the time of filing his notice of lien.<sup>1</sup> So, where the law provided that "such notice must be filed with the clerk within sixty days after the materials are furnished," and materials are furnished not under a continuing contract, the notice to create the lien must be filed within sixty days after delivery, and the furnishing of subsequent materials will not revive the lien otherwise lost. The apprehension of offending a customer may often operate upon the seller to delay or omit to take the benefit of the provisions of the statute, but the courts cannot construe the statute to suit such convenience.<sup>2</sup>

§ 325. **Running Account. — Entire Contract.** — Whether the contract which has been found by the jury is entire, is a question of law.<sup>3</sup> Where the contract for several items of work is entire, it is sufficient if a notice is filed within thirty days (or whatever period the statute names) after completion of the *last item*.<sup>4</sup> An important question sometimes arises under statutes which require suit to be instituted within a certain period after materials are furnished, as to what are continuing contracts. If materials are furnished in pursuance of a single continuing contract, such as to furnish materials for a building about to be erected, or in progress of construction, the period within which the statement or suit must be filed commences to run from the delivery of the last item. But if the materials are furnished under separate orders, in pursuance of a general agreement to furnish such materials as may be needed, from time to time, and as ordered, then each order or request is a separate contract, and the statement or suit must be filed within the time limited after delivery upon each order.<sup>5</sup> Whether two items of service form one account so that the time of filing a lien statement for both runs from the time of the last item, depends on whether the two services were rendered on the same job, the same piece of work, the same contract, or not.<sup>6</sup> Where the contractor errs in his computation as to the amount of brick needed for the building, and afterward orders more from the same materialman, and the price per thousand is different, still the furnishing

<sup>1</sup> Goodale v. Walsh, 2 Thomp. & C. (N. Y.) 311.

<sup>2</sup> Spencer v. Barnett, 35 N. Y. 94; affirmed in Tiley v. Thousand Island Hotel Co., 16 N. Y. Supreme Ct. 428

<sup>3</sup> [Page v. Bettes, 17 Mo. App. 366.]

<sup>4</sup> [Silvester v. Coe Quartz Mine Co., 80 Cal. 510.]

<sup>5</sup> [Lane v. Jones, 79 Ala. 156; Phillips, § 324, cited with approval.]

<sup>6</sup> [Frankoviz v. Smith, 34 Minn. 403.]

of the brick is continuous, and is an entire transaction.<sup>1</sup> A running account has been deemed an entire contract, and for materials furnished thereunder it is sufficient if the proceedings be instituted within six months after the last item was furnished.<sup>2</sup> Each item should not be regarded as a separate cause of action, but rather a continuous dealing, with an understanding between the parties that a credit of some time was to be granted to the purchaser, which would not fairly expire until after the last item was delivered; and, therefore, under a code limiting the action to "within one year from the time payment should have been made," in a running account for materials furnished during the building, in the absence of proof to the contrary, the date of the last item in the account will be regarded as the time payment should have been made in order to bring the account within the year.<sup>3</sup> And an act which provides that "whenever the items of a mechanic or material-man's bill for work done or materials furnished continuously toward the erection of any new building are in any part *bona fide* within six months before the claim therefor, the lien shall be valid for the whole," was intended to do no more than merely link together the items of a bill by means of a contract or single order for the whole. Its purpose was, when the materials were in part furnished for a single building to the same contractor, in the ordinary progress of the work upon it, thus giving to them a unity of purpose, if not of contract, to correct that apparent want of continuity which exists where there is no contract or general order for the whole bill.<sup>4</sup> "When materials are furnished and work done in the erection of a building, as ordered by the owner or contractor from time to time in the ordinary progress of the work, the act of 1855 gives to them a unity as if furnished under a contract or order for the whole."<sup>5</sup> Although the work done within thirty days before filing the claim was not work contemplated by the contract, yet if it was done under the direction of the contractor, whose obligations to the owner were not extinguished since he had certain debris to remove, the filing of the lien is in time.<sup>6</sup> So, where miners filed mechanics' liens for work done in the development of a mine, and it appeared that they worked a portion of the time under special contracts and a

<sup>1</sup> [St. Paul, &c. Co. v. Stout, 45 Minn. 327, 329; State Sash & D. M'fg Co. v. Seminary, 45 Minn. 254.]

<sup>2</sup> Stine v. Austin, 9 Mo. 554.

<sup>3</sup> Merchand v. Cook, 4 Iowa, 115.

<sup>4</sup> Singerly v. Doerr, 62 Penn. 9; Diller v. Burger, 68 Penn. 432.

<sup>5</sup> [Appeal of Hofer, 116 Penn. 360, 364.]

<sup>6</sup> [Gordon Hardware Co. v. R. Co., 86 Cal. 620, 622.]

portion of the time by the day, but always under the direction of the foreman of the mine, the work was one continuous employment and not distinct and independent jobs or contracts, and each miner might file one lien for all his labor within the proper time after stopping work.<sup>1</sup> Since the first edition of this work, the following additional decisions have been reported, illustrating this subject. Where all the items in an account relate to one transaction, it constitutes a continuous account, regardless of intervening balances, and dates from the day of the last item.<sup>2</sup> If the several items of an account form parts of one contract, and the last accrues within the statutory limit before the time of filing the lien, it will attach to all.<sup>3</sup> Where there has been a continuous delivery of materials, which are put into a structure, the Statute of Limitations begins to run against the lien therefor from the delivery of the last lot of materials.<sup>4</sup> Where work was commenced in April, 1872, and other work was done from time to time during the summer, the last item of work being performed Aug. 14, 1872, and a lien law provided that the notice should be filed within thirty days after the performance and completion of the labor, and a lien was filed within thirty days from last item, it was held that the lien was valid for the entire claim, the claim arising out of what was all really one piece of work, though done at different times.<sup>5</sup> Under a statute where the claim must be "filed within thirty days after he ceases to labor on such building," and labor is performed in the construction of a building, under different contracts, all of which are made before the work under any one is completed, the service is continuous, and a statement filed within the period after the entire work is done is in time, although filed after the time had elapsed under some of the contracts.<sup>6</sup> Where a party works twenty-one months under a contract for a sum certain per annum, the time is not counted from the end of the year, but from the period when he ceased to work.<sup>7</sup> A party contracted to haul a quantity of lumber at a stipulated price per thousand feet. He had a lien on the whole quantity drawn, within the statutory period to enforce the lien, and not a separate lien on each thousand feet for the price of drawing the same.<sup>8</sup> Although it is not stated in so many words that all the items were furnished under one contract, yet if there is evidence that such was the understanding of

<sup>1</sup> *Skyrme v. Occidental Mill Co.*, 9 Nev. 219.

<sup>2</sup> *Lamb v. Hannerman*, 40 Iowa, 41.

<sup>3</sup> *Schmeiding v. Ewing*, 57 Mo. 78.

<sup>4</sup> *O'Leary v. Burns*, 53 Miss. 171.

<sup>5</sup> *Costello v. Dale*, 8 N. Y. Supreme Ct. 489; s. c. 3 *Thomp. & C.* (N. Y.) 493.

<sup>6</sup> *Miller v. Batchelder*, 117 Mass. 179.

<sup>7</sup> *Alvord v. Hendrie*, 2 Mont. 115.

<sup>8</sup> *Bean v. Brown*, 54 N. H. 395.

the parties, the contract will be deemed entire, and the lien will be a single one.<sup>1</sup> Where a glazed door was delivered, and afterward the glass taken out and changed, it was held to have been furnished when first delivered, and the sixty days for filing a lien ran from that time.<sup>2</sup> If the claim of a sub-contractor is filed within thirty days after the last item (a blind furnished the contractor in good faith), the owner cannot defeat the lien by returning the blind.<sup>3</sup> The thirty days begins to run from the last work done, although settlements are made semi-monthly, and notes taken. This does not break the contract into parts. It is continuous, and a lien for the work done months before is filed in time if within thirty days after the last work.<sup>4</sup> That notes were given for part of the goods in the account is not conclusive that the account was not a running account.<sup>5</sup> Where the plaintiff contracted to build a structure for the defendant at an agreed price, and after some progress had been made in the work, the city authorities interfered and compelled sundry changes in the plans and specifications, whereby the costs would be considerably increased, and the parties agreed that the changes should be made, and that the defendant should pay an agreed additional sum therefor, then for the purpose of a mechanics' lien, the entire work must be considered as a unit, and as done under a single contract.<sup>6</sup> Whenever the contract is entire the several parts of it may be united in a lien claim filed sixty days after the last work was done. As where poplar and birch logs were cut and hauled for the same person under one contract, and the hauling of the birch was completed Feb. 11, the poplar Feb. 24, an attachment within sixty days after the latter date secured a lien on the birch as well as the poplar.<sup>7</sup>

§ 326. **Whether Work is performed under Entire or Distinct Contracts is Question for Jury.**—Whether the work as done was performed under an entire or distinct contract, is necessarily a question for the jury,<sup>8</sup> and a charge by the court withdrawing this question from them is erroneous. In one case, where there had been a cessation in the work after part of it was done, and before it was completed, and subsequently other work was performed, it was decided that, as to whether the claim had been

<sup>1</sup> [Fulton Iron Works v. North Center Creek M. & S. Co., 80 Mo. 265, 269.]

<sup>2</sup> [Johnson v. Gold, 32 Minn. 535.]

<sup>3</sup> [Hug v. Hintrager, 80 Iowa, 359, 364.]

<sup>4</sup> [Craddock v. Dwight, 85 Mich. 587.]

<sup>5</sup> [O'Brien v. Hanson, 9 Mo. App. 545.]

<sup>6</sup> [Bruns v. Braun, 35 Mo. App. 338.]

<sup>7</sup> [Phillips v. Vose, 81 Me. 134, 136; Sheridan v. Ireland, 66 Me. 65.]

<sup>8</sup> [Heltzell v. C. & A. Ry. Co., 20 Mo. App. 435.]

filed in time, it should have been submitted to the jury to determine if the work last done was a part of the original agreement, without unreasonable delay, with the consent of the owner, or was a distinct contract, entered into after the first work was finished.<sup>1</sup> Again, it has been held that the question whether a lien is filed within the time allowed is one of fact, and where a judge tries the case without a jury his decision is final.<sup>2</sup> In another, a party having erected a brewery built an addition to it, and the material-man, having furnished materials for both buildings, filed a lien within the statutory limitation after the last item was furnished to the second. It was left to the jury to determine if the additional building was a continuance of the first, and was to be considered as one building.<sup>3</sup> Whether goods are delivered under separate or continuous contracts is a question for the jury, and the fact that long intervals of time elapsed between them is no reason for the court rejecting certain items.<sup>4</sup> But in determining whether the work has been done under a distinct or an entire contract, the jury may consider the payments made on portions of the work done or materials delivered as evidence from which to determine the understanding of the parties.<sup>5</sup> Each case must be decided according to the proofs offered,<sup>6</sup> and be determined by them.<sup>7</sup> An auditor to whom the case is referred has authority to determine if lien was filed in time, and all matters of fact legitimately involved in the question of lien.<sup>8</sup>

§ 327. **When lost by Limitation cannot be revived.**—After the contract is once completed and the statutory limitation begins to run, a party cannot revive an expired right of lien which he has lost in consequence of laches by performing some work in the house;<sup>9</sup> as the repair of a mere leak in the roof of the building,<sup>10</sup> or patching of plastering after the work has been substantially completed;<sup>11</sup> or the addition of two bolts, which were not to be used in the construction of the building.<sup>12</sup> No such artifice will save him from the operation of the limitation.<sup>13</sup> Occasional repairs subsequently made cannot be added to work done months before, so as to render the whole work one continued per-

<sup>1</sup> *Holden v. Winslow*, 18 Penn. 160.

<sup>2</sup> *Turner v. Wentworth*, 119 Mass.

459.

<sup>3</sup> *Diller v. Burger*, 68 Penn. 432.

<sup>4</sup> *Treusch v. Shryock*, 51 Md. 163.

<sup>5</sup> *Pratt v. Campbell*, 24 Penn. 184.

<sup>6</sup> *Squires v. Fithian*, 27 Mo. 134.

<sup>7</sup> *Livermore v. Wright*, 33 Mo. 31;

*Okisko v. Matthews*, 3 Md. 168.

<sup>8</sup> *Corbett v. Greenlaw*, 117 Mass. 167.

<sup>9</sup> *Noel v. Temple*, 12 Iowa, 276.

<sup>10</sup> *Dunn v. McKee*, 5 Sneed (Tenn.),

657.

<sup>11</sup> *Wilson v. Forder*, 30 Penn. 129.

<sup>12</sup> *Barrows v. Knight*, 55 Cal. 155; *Gale*

*v. Blaikie*, 129 Mass. 209.

<sup>13</sup> *Squires v. Fithian*, 27 Mo. 134.

formance, for which a single lien can be claimed within sixty days after the last repairs.<sup>1</sup> So, where the notice to hold an owner liable has to be given within a certain time, it is not in the power of the contractor and material-man to contract to extend the time of payment, and thus extend the statutory liability of the owner, without his knowledge or consent.<sup>2</sup> In such cases, the evidence should fairly show that the lien claimant has brought himself within the law; and when the circumstance of completion is easy of proof, and the evidence of the complainant is meagre and unsatisfactory, a fair presumption may be raised, if the other facts justify it, that the work was done at a time which would be barred by the statute.<sup>3</sup> But if, after a contract for building a house and structures connected therewith has been substantially performed, and a bill rendered for the work done under the same, further work be done, which the proper performance of the contract calls for, and not for the purpose of fixing a later date from which to compute the time allowed by statute for filing a statement to enforce a mechanics' lien, the time of performing such further labor may be taken as such date.<sup>4</sup> In all these cases it is important, particularly when the rights of third persons are involved, that the claim of lien or bill of particulars should show that the last item of work was within the statutory period, for otherwise the lien would be void on its face, and the claimant prevented from showing that the last work actually performed was within that period.<sup>5</sup>

§ 327 *a*. **Same.** — It is particularly as regards the rights of *bona fide* purchasers and encumbrancers that the claimants of this lien are held to the strictest compliance with the statutory provisions as to the time of its enforcement. Mechanics and material-men, it is said, should understand that any unreasonable delay in giving public notice of their intention to hold a lien is dangerous, as the public in purchasing the property have nothing to warn them after the building is substantially completed, and the statutory period for filing the notice of lien has expired. Thus, where under a contract to build a dwelling-house the petitioners had finished it on the 7th of April, with the exception of a few hours' work, embraced in the contract, which was not done until the 27th of the following September, no reason being shown for the delay, it was held that the sixty

<sup>1</sup> Davis v. Alvord, 94 U. S. 545; Berry v. Turner, 45 Wis. 105.

<sup>2</sup> Kelly v. Kellogg, 79 Ill. 477.

<sup>3</sup> Dunn v. McKee, 5 Sneed (Tenn.),

<sup>4</sup> Hubbard v. Brown, 8 Allen (Mass.), 590.

<sup>5</sup> Bement v. Trenton Co., 32 N. J. L. 513; s. c. 31 N. J. L. 246.

days allowed them by the statute for filing their lien was to be reckoned from the 7th of April, and not from the 27th of September.<sup>1</sup> Where the statute giving to mechanics a lien requires that a certificate of the lien shall be filed for record within sixty days after the completion of the work, it was held that, after a contract for work is substantially performed, there must be no unnecessary or unreasonable delay in fully completing the work to be done, and that any work done after such delay will not be considered in fixing the sixty days allowed for recording the lien. Thus where a painter contracted to paint a house, the work to be done by the first day of April following, and it was all done by that time, except the painting of a front piazza the second time, which was afterwards deferred for the convenience of the occupants and from other causes, and finally was not done till the following January, it was held that this work could not be considered in fixing the sixty days allowed for recording the lien. To allow any other construction, where a contract to all appearances had been completed eight months before, purchasers would have no reason to suppose a lien was intended to be placed on the property, and might be easily defrauded.<sup>2</sup> But where the final completion of the work has been postponed at the instance or request of the owner, he will not be allowed to make the objection that the notice has not been filed in time, provided it be actually filed within the statutory period after the actual completion of the contract as requested by the owner. Thus where a building was to be completed on Nov. 15, 1876, and it was all done, except a well-curb and plastering around a mantel, which were delayed until Feb. 27, 1877, at the request of the owner, and no parties claimed equities, it was held that the work was, as against the owner, to be deemed completed at the last mentioned date.<sup>3</sup> Where the plaintiff completed a house on the 6th of August, and the defendant went into possession, and in September plaintiff hung blinds, and on Nov. 22, at the owner's request, did final work worth \$14, such work being necessary to comfortable use of the house in winter, it was held that the final work preserved the lien; although it would have been otherwise, if the work had been added by the plaintiff for the mere purpose of keeping his lien, or if the rights of third parties had intervened after the apparent completion of the house.<sup>4</sup> Where the lien continues

<sup>1</sup> *Sanford v. Frost*, 41 Conn. 617.

<sup>2</sup> *Flint v. Raymond*, 41 Conn. 513.

<sup>3</sup> *Cole v. Uhl*, 46 Conn. 296.

<sup>4</sup> [*Nichols v. Culver*, 51 Conn. 177, 183.]



"until after the expiration of six months after the material furnished," and the property has been sold before completion, and after the sale a small quantity of lumber was delivered, by agreement between the vendor and material-man, for the purpose of preserving the right of lien, which material was not used in the building, it was held that it did not constitute a proper item for allowance, or preserve the lien which had otherwise expired.<sup>1</sup>

§ 327 *b*. **Lien cannot be revived by Amendment or Order of Court.** — The legislature intended a party asserting the lien should speedily pursue his remedy. Our jurisprudence does not favor secret, tacit liens; suit must therefore be brought within the statutory period, and where the mechanic brings a personal suit he cannot, after the time allowed by law has expired, so amend his action as to turn it into a proceeding to enforce the lien.<sup>2</sup> A lien cannot be amended after the expiration of the statutory period by adding the names of new parties as owners or reputed owners.<sup>3</sup> Where a lien expires within one year unless judgment is obtained, and although courts have the power generally to enter judgments *nunc pro tunc*, they cannot extend the time limited by the statute within which the lien must be prosecuted to judgment.<sup>4</sup> Where the statute has provided the manner in which the lien may be created and enforced, the contract, in order to preserve the lien, must be made to conform to the provisions of the statute, and not the statute to the terms of the contract. Thus, where "the lien shall be deemed as having been dissolved, unless an action shall have been brought to enforce the same within six months from the day of filing the account in the clerk's office," and the claim does not mature within that period so that an action may be brought to enforce it, the lien is lost, and no judicial aid or construction of the statute can be made to avail the mechanic.<sup>5</sup> Under the provision of an act providing for the continuance of a lien "by order of court," the order of any court having jurisdiction of such liens is sufficient; and no notice of application for such an order is necessary, unless the court to which application is made requires it. But notwithstanding the lien may cease if the statute authorizes it, the court having acquired jurisdiction may retain it, and render a personal judgment.<sup>6</sup>

<sup>1</sup> Heath v. Tyler, 44 Md. 313.

<sup>2</sup> Dinkins v. Bowers, 49 Miss. 222.

<sup>3</sup> O'Neill v. Hurst, 11 Phila. 171;  
Manufacturing Co. v. Hospital, 12 Phila. 483.

<sup>4</sup> Dart v. Fitch, 30 N. Y. Supreme Ct. 361.

<sup>5</sup> Hardin v. Marble, 13 Bush (Ky.),

60.

<sup>6</sup> Darrow v. Morgan, 65 N. Y. 333.

§ 327 *c.* **Lien valid for Part of Claim.** — Where a mechanic is required to commence proceedings to enforce his lien within six months from the time he shall have commenced the work, and he performs certain work, such as building a chimney, and at a later period received an order to do other work, — although the lien was lost by lapse of time on the first, it did not affect the second claim.<sup>1</sup> So, where some of the claim is a running account, and the rest is no part of the account, the record of the lien in time for the one may be too late for the other. For example, construction, or original furnishing and fitting up, being distinct in its nature from subsequent repairs, the law, in the absence of evidence to the contrary, will presume it took place under a distinct contract.<sup>2</sup>

§ 328. **Effect when Several Houses are erected together.** — The effect of the performance of work on one of several houses erected together, to maintain alive a lien on others which would otherwise have expired, has been differently decided. A law provided that "where one claim for materials is filed by the person preferring the same against two or more buildings owned by the same person . . . the person preferring the same shall designate the amount which he claims to be due him on each of such buildings." Under these circumstances materials were furnished for several houses, and some were delivered within the period in which the lien is protected, and were used in one of the houses only, and it was held that the lien remained against all, though the claimant in enforcing his lien must apportion his demand among them, and is restricted in his recovery against the several houses to the amount claimed against them respectively. In such cases the claimant credits the party with reference to certain houses together, and the law gives him a lien against all, to be thereafter apportioned. If the lien would be lost because some of the materials were supplied at an earlier period than is protected, owners, by using the materials furnished within the period protected by the statute on one house, might defeat the lien against the others, and claimants would be obliged to show that some portion of their goods furnished within that time had been used on each house against which a lien might be claimed, notwithstanding the person who sells the materials is not presumed to know anything of the condition and progress of the buildings being erected or repaired.<sup>3</sup> In a later case where W. agreed to furnish heaters for twenty-three

<sup>1</sup> *Kenyon v. Peckham*, 10 R. I. 402.

<sup>3</sup> *Okisko v. Matthews*, 3 Md. 168.

<sup>2</sup> *Louden v. Coleman*, 59 Ga. 653.

houses on contiguous lots, the contract being entire, a claim filed six months after its completion was held sufficient, though as to some of the houses the work had been done more than six months previously.<sup>1</sup> But in Pennsylvania, where the law also requires that when several houses are built together the lien shall be apportioned among them, work done on one of them will not keep alive a lien against the others upon which no work was done within the time allowed for filing the lien.<sup>2</sup> So, where materials are furnished, not under a contract for the whole, for two buildings, which are the proper subject of an unapportioned lien, the claims for the materials for the building first erected must be filed within the statutory period from the time the last materials for it were furnished. The subsequent furnishing of materials for the other building will not extend the time for the filing for the materials furnished for the first building.<sup>3</sup>

§ 329. **When Limitation is to be computed from Time when Debt is due.** — Another practical question is, From what period is the time in which to file the lien to be counted, — whether from the time the claimant's debt became due; or from the completion of the entire building; or from his particular portion of the work; or from the commencement of the work. Its determination depends entirely upon the statute under which the lien arises, and, if not strictly complied with, no considerations of equity, no suggestion that it would be better for all parties that the suit should have been postponed, no parol agreement, and no covenant, however formal, short of a mortgage, amounting of itself to a new lien, — can save it.<sup>4</sup> As between the parties, however, it has been held that the performance of such acts may be waived by their parol agreement, and the lien as to them will be valid, under the maxim, *modus et conventio vincunt legem*, which is alleged to be directly applicable to this lien.<sup>5</sup> Each period has been adopted in some one State at least. The decisions illustrating the various statutes, which make the time when the debt is due the period from which the limitation is reckoned, are as follows: A law gave the right to enforce the lien "within three months from the time payment should be made, by virtue of the contract;" a petition could not be filed before the day of payment stipulated by the parties had arrived, and the time was to be computed from that period.<sup>6</sup>

<sup>1</sup> [Schaper v. Bibb, 71 Md. 145.]

<sup>2</sup> Wilson v. Forder, 30 Penn. 129.

<sup>3</sup> Hudnut v. Roberts, 10 Phila. 535.

<sup>4</sup> Hilliard v. Allen, 4 Cush. (Mass.)

536; McKinney v. Springer, 6 Blackf.

(Ind.) 511; Pifer v. Ward, 8 Blackf. (Ind.) 252.

<sup>5</sup> Wallace's Appeal, 5 Penn. St. 103.

<sup>6</sup> Kinney v. Hudnut, 3 Ill. 472.

Six months after the last payment for labor or materials comes due, the action to foreclose a lien is barred. A purchaser of the property after that time is safer.<sup>1</sup> A contract for mining cars and iron work for a coal-breaker, the cars to be delivered from time to time as needed, will not extend the time of filing a lien beyond the six months after the construction of the breaker is completed. Neither will changes and alterations in the breaker, found necessary after its completion, extend the time.<sup>2</sup> But, ordinarily, where there is no provision to the contrary, a party may bring suit to enforce his lien as soon as the amount is due.<sup>3</sup> So, where persons "shall file in the recorder's office, within sixty days after the debt becomes due, notice of their intention to hold a lien," if the materials were sold on credit, the claim need not be filed until after the expiration of the time of credit; but if no time be given for payment, the law implies a contract to pay for them on delivery, and the notice must be filed within sixty days from that time.<sup>4</sup> Again, where a statute required the action to be brought "within six months after the money claimed becomes due," if no time be fixed by contract to pay for the materials or labor done, then the law implies a contract to pay presently on delivery or performance, and from that date a computation of the six months, within which to bring suit, should begin. In case of special contract, it begins to run on the day the money becomes due by its terms.<sup>5</sup> The Alabama Code provides that the lien "shall be deemed lost, unless suit for the enforcement thereof is commenced within six months after maturity of the entire indebtedness secured thereby."<sup>6</sup> In this case it was held that the building being destroyed by fire before completion, the whole amount of the contract, which was an "entire contract," became due at once, if at all, and not at the time when the building would have been completed but for the accident.<sup>7</sup> "Every person who wishes to avail himself of the preceding sections shall give notice to the owner, owners, or agent, within thirty days after the indebtedness accrued, or the completion of the building or improvement:" a material-man who gives notice of his claim of lien for materials furnished more than thirty days after the indebtedness for such materials accrues, has lost his lien by his delay, although such notice may have been given

<sup>1</sup> [Douglas v. Davies, 23 Ill. App. 618.]

<sup>2</sup> [Harman & Hassert's App., 124 Penn. 624; Ryman & Sons' App., Id. 635.]

<sup>3</sup> Weeks v. Walcott, 15 Gray (Mass.), 54.

<sup>4</sup> Robinson v. Marney, 5 Blackf. (Ind.) 329.

<sup>5</sup> Ehlers v. Elder, 51 Miss. 495.

<sup>6</sup> [Cutcliff v. McAnally, 88 Ala. 507, 509.]

<sup>7</sup> [Ibid, 510, 511.]

within thirty days after the completion of the buildings; so, under this statute, a laborer should give his notice within thirty days after his wages are due.<sup>1</sup> Again, where a contract provides that the price of work or materials shall "be payable when the job is completed, in satisfactory six months' paper, interest added," the time in which suit is to be begun under a law, "that legal process for enforcing the lien shall be commenced within four months after any payment shall become due or the lien shall be wholly lost," begins to run from the maturity of the six months' paper provided for by the contract as the time of payment under the same, and not from the completion of the work.<sup>2</sup> So, where a contract provided for submission to arbitration, and the arbitrators, within the scope of their authority, fixed the period for payment, and suit was brought within six months from that date, it was in time, under a statute which provided that "the lien shall be dissolved at the expiration of six months after the time when the money due by the contract or the last instalment thereof shall become payable, unless a suit for enforcing the lien shall have been commenced within the said six months."<sup>3</sup> So, if suit must be brought "within one year from the time of payment," and the contract is that when the work is completed the time when payment should be made should then be agreed upon, and a note is taken payable May 1, 1848, this is the same as if the parties had agreed in the original contract, and a summons served March 27, 1849, to enforce the lien, is sufficient.<sup>4</sup> Where a law provided that "no suit shall be commenced unless the same shall be brought within three months from the performance of the sub-contract, provided, if any delay shall be occasioned by reason of the amount not being due the original contractor, the time of such delay shall not be counted," a suit by a sub-contractor is in time if filed within three months after the money becomes due to the original contractor, although it is more than three months after it is due from the original contractor to such sub-contractor.<sup>5</sup>

§ 329 *a*. **Insolvency of the Debtor** does not relieve the worker of the necessity of commencing suit within the regularly provided period.<sup>6</sup> Where in a mechanics' lien filed for materials furnished by a sub-contractor, the only items charged for, as furnished within six months before the filing, were two hearths,

<sup>1</sup> Patrick *v.* Valentine, 22 Mo. 143;  
Schulenberg *v.* Gibson, 15 Mo. 281.

<sup>2</sup> Wheeler *v.* Schroeder, 4 R. I. 383.

<sup>3</sup> Kirby *v.* Tead, 13 Met. (Mass.) 149.

<sup>4</sup> Mix *v.* Ely, 2 Greene (Iowa), 513.

<sup>5</sup> Meeks *v.* Sims, 84 Ill. 422.

<sup>6</sup> [Bradford *v.* Dorsey, 63 Cal. 122.]

supplied gratuitously in the place of defective hearths furnished and charged for more than six months before, and a portable stove, in no sense used or intended to be used in the construction of the building, these items would not operate to extend the statutory time for filing the claim, and the plaintiff was not entitled to the lien claimed.<sup>1</sup> Work done or materials furnished within six months prior to the filing of a mechanics' lien to compensate for defective performance of a building contract, completed more than six months prior, will not extend the time and preserve the right to file such lien.<sup>2</sup> The limitation of one year after completion of the building may be extended by the paramount limitation respecting the bringing of a new action within a year after a former one fails otherwise than upon the merits.<sup>3</sup>

§ 330. **Completion of Entire Work.**<sup>4</sup>— When completion of work is made the period to count from, and a party performs part of the work or furnishes part of the materials, it must be carefully observed whether the time in which to proceed for the enforcement of the lien commences from the completion of his portion of the job or last delivery of materials, or from the finishing of the entire building. When a statute gives sixty days from "completion of the building" to file the lien, a mechanic is not bound to file it within sixty days from the time when he furnished labor.<sup>5</sup> Under the provision that the statement is to be filed "within sixty days after completion of the building improvements or repairs, or the furnishing or putting up of fixtures or machinery, or the performing of such labor," it is held that a sub-contractor's statement is in time if filed within sixty days after completion of the principal contract under which he sub-contracted, though the filing is more than sixty days after the completion of his sub-contract furnishing materials or labor.<sup>6</sup> So in the District of Columbia the time for filing notice is to be computed from the completion of the building under the principal contract, and not of the particular work for which a lien is claimed, or of work on the building after the original contract under which the sub-contractor or laborer claims is completed.<sup>7</sup> A statute providing that notice of the lien was to be filed within six months after "the performance of such labor or the furnish-

<sup>1</sup> [*Homœopathic Ass'n v. Harrison*, 120 Penn. 28.]

<sup>2</sup> [*Harrison v. Homœopathic Ass'n*, 134 Penn. 558; *Homœopathic Ass'n v. Harrison*, 120 Penn. 28; *McKelvey v. Jarvis*, 87 Penn. 414, followed; *Parrish's App.* 83 Penn. 111, distinguished.]

<sup>3</sup> [*Seaton v. Hixon*, 35 Kan. 663.]

<sup>4</sup> This section was cited with approbation in *Hart v. Mullen*, 4 Colo. 515.

<sup>5</sup> *Clough v. McDonald*, 18 Kan. 114.

<sup>6</sup> [*Cunningham v. Barr*, 45 Kan. 158, 160.]

<sup>7</sup> [*Phoenix Iron Co. v. The Richmond*, 6 Mackey (D. C.), 180, 189; *Martin v. Campbell*, Id. 296.]

ing of such materials" by the contractor, sub-contractor, laborer, or person furnishing materials, was held to mean after the building was completed; and therefore, where work was to be paid for by instalments, although more than six months had expired from the time it was due, yet, if the notice were filed within six months from the completion of the building, it was sufficient. So, if filed within that period after the completion of the extra work.<sup>1</sup> The same has been decided in another State, that the time given for filing the lien does not commence until extra work, done at the request of the owner, is finished, although the work which had been specially contracted for had been previously completed, under a law that "every such debt shall be a lien until the expiration of six months after the work shall have been finished or materials furnished," etc.<sup>2</sup> Where work done under a contract is substantially finished and accepted more than six months prior to the filing of a lien, and extra work is done thereafter to supply a deficiency in the work done under the contract, this will not extend the time of filing the lien to six months from the time said extra work was finished; but if said extra work was done under an agreement with the owner that it should be done as a substitute for work which was to be done under the original contract, and no additional compensation was to be allowed therefor, the time of the lien will be extended.<sup>3</sup> Where, after possession is delivered of a building, the architect discovers defects, which he requires to be remedied, and they are by the sub-contractors, the time of the completion of the building, as against them, will be counted from the date of the completion of the repairs.<sup>4</sup> Again, where the lien expires unless a claim be filed "at or before the expiration of six months after the work shall have been finished, or materials furnished," alteration of the original work under a contract, which was the result of a mistake of the owner, will be considered as part of the original contract, and enable a claimant to count the time of performance from the date of furnishing it.<sup>5</sup> Where the original contract is for a specific sum, but with an agreement for alterations and changes in plans, and an agreement by the owner to pay what is equitable, any work growing out of such alterations is not extra work, and the lien of the sub-contractor attaches thereto, the same as for work done under the specifica-

<sup>1</sup> Webb v. Van Zandt, 16 Abb. Pr. (N. Y.) 190.

<sup>2</sup> Johns v. Bolton, 12 Penn. 339.

<sup>3</sup> McKelvey v. Jarvis, 87 Penn. 414.

<sup>4</sup> Nat. Stock Yards v. O'Reilly, 85 Ill. 546.

<sup>5</sup> Parrish and Hazard's Appeal, 83 Penn. 111.

tions.<sup>1</sup> Extra work done and materials furnished by a contractor during the performance of his agreement may be included in and constitute a part of his claim.<sup>2</sup> A similar statute gave a lien "if the claim was filed within six months after the materials were furnished or after the completion of the work," and a party was considered in time if he filed his claim either within six months after the materials were furnished, or within six months after the completion of the work.<sup>3</sup> When a building contract provides that the structure is to be deemed completed when it is all done but "the finishing touches," the ninety days for filing a lien begin to run at the said time, and not at the later and final completion of finishing and all.<sup>4</sup> Whenever work is abandoned either by the fault or with the consent of the owner, the building is deemed completed for the purpose of filing a lien.<sup>5</sup> The same principle holds if the contractor permanently abandons the work. It would be grossly inequitable to bar a sub-contractor of his remedy, because the contractor refused to do his duty.<sup>6</sup> If the statute requires the sub-contractor to present his claim to the owner within ten days after the "job or contract" let by the owner "shall have been fully completed," the meaning is, ten days after the original main contract under which the claimant worked is completed. And if the claimant's contractor stops work and refuses to complete the contract, the ten days begins to run then, and not at the time when the owner or another contractor finishes the undertaking.<sup>7</sup> Evidence of an abandonment of the construction by the owner O., is sufficient if he *continues* the owner. But if it is shown that O. conveyed to D., and it does not appear whether D. completed the work or not, the case is incomplete.<sup>8</sup> Under the California statute of 1887 "the occupation or use of the building, improvement, or structure, by the owner, or his representative, or the acceptance by said owner or his agent of said building, etc., shall be deemed conclusive evidence of completion," and the lien may be filed within thirty days after the owner accepts the building from the contractor, whatever the actual condition of the work.<sup>9</sup> If the owner cancels the contract, accepts the unfinished work, and proceeds to complete it, the sub-contractor under the original contract may

<sup>1</sup> Brown v. Lowell, 79 Ill. 484.

<sup>2</sup> Rush v. Able, 90 Penn. 153.

<sup>3</sup> Okisko v. Matthews, 3 Md. 168.

<sup>4</sup> [Trustees v. Davis, 85 Va. 193.]

<sup>5</sup> [Shaw v. Stewart, 43 Kan. 572; Springs Co. v. Lumber Co., 47 Kan. 672, 675; Catlin v. Douglas, 33 Fed. Rep. 569; see § 323 a.]

<sup>6</sup> [Shaw v. Stewart, 43 Kan. 572, 578; Springs Co. v. Lumber Co., 47 Kan. 672, 675.]

<sup>7</sup> [Basham v. Toors, 51 Ark. 309.]

<sup>8</sup> [Cohn v. Wright, 89 Cal. 86.]

<sup>9</sup> [Giant Powder Co. v. Flume Co., 78 Cal. 193, 195.]



file their claims within the thirty days after the owner has thus accepted the work. Such facts constitute an "acceptance," "use or occupation" within the law. The owner uses and occupies in the same manner as the contractor had. The words "use and occupation" do not limit the law to dwelling-houses. It applies to all sorts of structures.<sup>1</sup> The provision making use and occupation by the owner conclusive evidence of completion only applies where there is a valid contract. When the contract is void for lack of record, a laborer or material-man cannot file his claim within thirty days after the owner takes occupancy, but must wait and file it within thirty days after the building is actually completed, or there has been a thirty days' cessation of labor on it.<sup>2</sup> The amendment of 1887 to the California code § 1187 provides that "a cessation from labor for thirty days upon any unfinished contract," . . . "shall be deemed equivalent to completion thereof," and it is held that the lien must be filed within thirty days after the end of the aforesaid thirty days' cessation. If not, it will be too late, though filed within thirty days after the actual completion of the building.<sup>3</sup> An amendment to the law respecting the time within which a claim must be made applies, although materials were furnished before the amendment.<sup>4</sup> A person who contracts with the owner to paper and decorate a house is an original contractor, and does not have to file his notice within thirty days after completion of the work.<sup>5</sup> A mere material-man is not a "contractor" within the meaning of the lien law.<sup>6</sup> Only one who agrees to do the whole or part of a building or other work, and *also* to furnish the materials is such a contractor.<sup>7</sup> Notices of claims given before the completion of the work are valid under a provision for a notice "at any time within ten days after the completion of the contract." This does not limit the time to ten days, but simply requires notices to be given before or within ten days after such completion.<sup>8</sup> In New Hampshire the statute time for securing the lien begins to run from the completion of the contract work.<sup>9</sup> The running of the limitation of the time allowed for securing a

<sup>1</sup> [Giant Powder Co. v. San Diego F. Co., 88 Cal. 20.]

<sup>2</sup> [Willamette, &c. Co. v. College Co., 94 Cal. 230; Willamette, &c. Co. v. Kremer, 94 Cal. 205.]

<sup>3</sup> [Mill & Lumber Co. v. Olmstead, 85 Cal. 80, two judges dissenting; Reed v. Norton, 90 Cal. 590, 600.]

<sup>4</sup> [Mill & Lumber Co. v. Olmstead, 85 Cal. 80.]

<sup>5</sup> [La Grill v. Mallard, 90 Cal. 373, 374, 376.]

<sup>6</sup> [Mulrine v. Washington Lodge, 6 Houst. (Del.) 350, 353.]

<sup>7</sup> [Id. & Curlett v. Aaron, 6 Houst. (Del.) 477, 480.]

<sup>8</sup> [Mer. & Tr. Bk. v. Mayor, &c., 97 N. Y. 355.]

<sup>9</sup> [Calef v. Brinley, 58 N. H. 90; Hill v. Callahan, 58 N. H. 497.]

mechanics' lien by attachment is not suspended by the lienee's breach of contract causing the lienor to abandon his work, and never resume it.<sup>1</sup> The time of completion of a building is a question of fact for the trial court, and its finding will not be disturbed on appeal where the evidence is conflicting.<sup>2</sup> A finding that the building was "completed on or about the 5th of April, 1879," is not so indefinite as to be a nullity.<sup>3</sup>

§ 330 *a*. **Completion of Claimants' own Work.** — Where a party "shall file within sixty days after the completion of the building or repairs, notice of his intention to hold a lien for the amount of his claim," he who builds a complete or entire building may acquire a lien by filing his notice within sixty days after the completion of the building, but one who performs work for a part only of a building must file his notice within sixty days from the completion of *his* work.<sup>4</sup> In such case the allegation should be that the claim was filed within sixty days from the completion, of his work, and not after the completion of the building.<sup>5</sup> Where A. has the contract for the stone work on an opera house, and he sublets to B. the furnishing of the materials for such stone work, the building is completed as to B.'s lien when A. and B. have fulfilled their contracts.<sup>6</sup> In Massachusetts the statement must be filed within thirty days after the last item of material furnished under an entire contract, and actually used in the erection of the building.<sup>7</sup> Again, where "all persons performing labor or furnishing materials for the construction or repair of any building may have a joint lien to the extent of the labor done or materials furnished by them respectively, and may enforce the same at any time within one year from the completion of the work or furnishing of materials," the time within which the claim may be enforced by a party is one year after his own job is completed or the materials furnished, and not from the time when the building was finished.<sup>8</sup> Under another law, that "no such debt for work and materials shall remain a lien on the said house . . . longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted or the claim filed within three months after performing the work," a material-man had no lien

<sup>1</sup> [Freeto v. Houghton, 58 N. H. 100.]

<sup>2</sup> [Willamette, &c. Co. v. Kremer, 94 Cal. 205.]

<sup>3</sup> [Sturges v. Green, 27 Kan. 235, 236.]

<sup>4</sup> Hamilton v. Naylor, 72 Ind. 171; Thomas v. Kiblinger, 77 Ind. 85; [Stephen-son v. Ballard, 82 Ind. 87.]

<sup>5</sup> Lawton v. Case, 73 Ind. 60.

<sup>6</sup> [Crawford v. Blackman, 30 Kan. 527; citing Phillips, §§ 323, 324.]

<sup>7</sup> [Kennebec Framing Co. v. Pickering, 142 Mass. 80.]

<sup>8</sup> Longest v. Breden, 9 Dana (Ky.), 141.

against a building after the expiration of two years from its commencement, unless an action was instituted or a claim filed within three months after the furnishing of the materials.<sup>1</sup> Where "it shall be the duty of every person . . . to file, within ninety days after all the things aforesaid shall have been furnished, a just and true account," the account should be filed within ninety days from the time property is placed upon the premises to be charged with the lien.<sup>2</sup> Again, where the filing of the notice must be "within sixty days after the performance and completion of the labor," it need not be filed until sixty days after the final furnishing of the materials.<sup>3</sup> Where notice of lien must be given within a certain number of days "after completion of contract, or payment should be made," in the absence of any special contract, or fixed custom of trade to the contrary, the law will imply that payment should be made on the delivery of the articles purchased, and the time must be counted from the day the last item of material is delivered.<sup>4</sup> Where "the claim shall be filed within six months from the date of the last charge for work and labor performed or materials furnished," and the work in the erection of fixtures in a building is done according to contract, so that the contractor might recover any sum that is payable immediately upon its completion, the claim must be filed within six months after completion.<sup>5</sup> Where the law requires a statement to be filed "within four months after furnishing or putting up machinery," the time dates from the actual putting up, and not from the time the contractor had agreed that it should be furnished or put up.<sup>6</sup> But, where a large quantity of material was furnished under a contract which provided for the payment of a gross sum when all had been delivered, held, that the materials had not been furnished until payment became due.<sup>7</sup> When lumber is supplied to the contractor to prop the walls, and perhaps to be used in the building, if not he would return them, and if he did use them would notify the lumber dealer, the time of furnishing in reference to the mechanics' lien law was when the dealer was so notified.<sup>8</sup> Although the last date of an item written in the account was a few days more than six months prior to the filing

<sup>1</sup> *McClellan v. Withers*, 4 Cranch C. C. 668; *Waller v. Dyer*, 5 Cranch C. C. 571.

<sup>2</sup> *White v. Chaffin*, 32 Ark. 71.

<sup>3</sup> *Chase v. James*, 17 N. Y. Supreme Ct. 506.

<sup>4</sup> *Kelly v. Kellogg*, 79 Ill. 477.

<sup>5</sup> *Berry v. Turner*, 45 Wis. 105.

<sup>6</sup> *Bashor v. Nurdyke*, 25 Kan. 222.

<sup>7</sup> *Haden v. Buddensick*, 6 Daly (N. Y.), 3; *Gates v. Buddensick*, 6 Abb. N. Cas. (N. Y.) 367.

<sup>8</sup> [*Marble v. Lumber Co.*, 19 Neb. 732, 735.]

of the lien, yet if the item so dated was for lumber, and the account shows that the lumber was subsequently used in the construction, and the plaintiff's affidavit shows that the last work was done within the six months, an objection that the lien was not filed within proper time cannot be sustained.<sup>1</sup> If *any part* of the last item entered into the construction within the statutory time, it is sufficient, although it does not appear how much of said item so entered within such time.<sup>2</sup> The time within which a lien must be filed for materials furnished, is to be computed from the date of the last actual shipment or delivery, and not from the time when they might have been delivered under the contract, but were not.<sup>3</sup> A contract to furnish, erect, and adjust machinery is not completed by delivery of it, but only by putting it in place and adjusting it so that it will work, and a lien filed within ninety days after such adjustment is in time, though more than ninety days after delivery of the property.<sup>4</sup> In Virginia notice and affidavit may be given the owner by a sub-contractor at any time between his doing the work and twenty days after the building is done.<sup>5</sup> Where employment is by the month, it does not terminate at the end of each month, and separate notices within thirty days after the end of each month are not requisite.<sup>6</sup> The same rule holds in respect to work by the day.<sup>6</sup>

§ 331. **Necessary Allegations and Proofs.**—The time, therefore, of the debt becoming due or finishing of the work is a very material point in issue, considered in connection with the filing of the notice of intention to hold a lien, or the instituting of legal proceedings. It must be alleged and proved;<sup>7</sup> for where the law requires notice to be filed or served or suit to be brought within a certain time, the lien is lost, unless it is strictly complied with.<sup>8</sup> The same proposition is expressed thus in several cases. A mechanic is required to show by strict proof that his claim of lien is filed within the statutory limit.<sup>9</sup> The *onus* of proving that any portion of the material furnished was delivered within the statutory period for filing the lien is upon the claim-

<sup>1</sup> [Bruns v. Braun, 35 Mo. App. 338.]

<sup>2</sup> [Schulenberg & B. L. Co. v. Strimple, 33 Mo. App. 154.]

<sup>3</sup> [Miller v. Whitelaw, 28 Mo. App. 639.]

<sup>4</sup> [W. C. Co. v. Yuengling, 125 N. Y. 1, 5, 6.]

<sup>5</sup> [Norfolk & W. R. Co. v. Howison, 81 Va. 125, 129-131; Railroad v. Miller, 80 Va. 521; Roanoke, &c. Co. v. Karn, 80 Va. 589.]

<sup>6</sup> [Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 586.]

<sup>7</sup> Peck v. Hensley, 21 Ind. 344.

<sup>8</sup> Willamette v. Perrin, 1 Oreg. 182; Donaldson v. O'Connor, 1 E. D. Smith, 695; Green v. Jackson Water Co., 10 Cal. 374; [Weithoff v. Murray, 76 Cal. 508; O'Brien v. Graham, 33 Ill. App. 547.]

<sup>9</sup> Kay v. Smith, 10 Heiskell (Tenn.), 41.

ant.<sup>1</sup> The evidence should establish with sufficient certainty that the claim has been filed within the statutory period.<sup>2</sup> When a note was given for the material it was held that in the absence of evidence it would be presumed that the last of the material was furnished when the note bore date.<sup>3</sup> That the price of some of the items of an account was agreed upon, while the price of others was not, is not conclusive that the account was not a running account within the meaning of the mechanics' lien law.<sup>4</sup> When the date of completing the work is in issue, a finding that it was completed "on or about" the day named in the complaint is insufficient to base a foreclosure.<sup>5</sup> Where to obtain a lien the claim must be filed "within sixty days after the completion of the building," and the averment was that the notice was filed within sixty days after the money was to have been paid for the brick, it was not sufficient, as it may or may not have been within sixty days after the completion of the building.<sup>6</sup> Where it was essential that it should be averred when the work was completed, a memorandum on an account and application for a mechanics' lien, not recorded with the lien, and with no proof in regard to the person who made the memorandum or of its truth, is no evidence at all.<sup>7</sup> But the precise date of allegation of the time when the building was completed need not be proved, provided it is shown that the lien was filed within the statutory period.<sup>8</sup> If, however, a system of special pleading be adopted, and all allegations not put in issue are deemed to be admitted, and a petition on the lien alleged the requisite notice to have been given, which the answer did not deny, the allegation as to time will be considered as admitted.<sup>9</sup> After verdict, it will also be presumed it was shown on the trial that the work was done within the statutory period.<sup>10</sup> Where no objection was made below to a bill that it was not filed within the proper time to enforce the lien, and no defence was made to the relief sought, it was held that a defendant, having taken no exception to the proceeding below, could take none in a supreme court on appeal.<sup>11</sup> Where a complaint to foreclose the lien failed to show that it was filed within the statutory period, it was held that the omission was one which should be taken advantage of by demurrer,

<sup>1</sup> *Ortwine v. Caskey*, 43 Md. 134.

<sup>2</sup> *Wilson v. Wilson*, 51 Md. 161.

<sup>3</sup> *[Goodbub v. Estate of Hornung, 127 Ind. 182.]*

<sup>4</sup> *[O'Brien v. Hanson, 9 Mo. App. 545.]*

<sup>5</sup> *[Cohn v. Wright, 89 Cal. 86.]*

<sup>6</sup> *City of Crawfordsville v. Irwin*, 46

Ind. 440; *City of Crawfordsville v. Burr*, 45 Ind. 258; *Sharpe v. Clifford*, 44 Ind. 346.

<sup>7</sup> *Lawson v. Coates*, 56 Ga. 379.

<sup>8</sup> *Cole v. Uhl*, 46 Conn. 299.

<sup>9</sup> *Gorman v. Dierkes*, 37 Mo. 576.

<sup>10</sup> *Ferguson v. Vollum*, 1 Phila. 181.

<sup>11</sup> *Robinson v. Brown*, 57 Tenn. 206.

and that after issue joined and decision rendered on the merits, the pleading would be upheld in the appellate court by every legal intendment.<sup>1</sup> Although a petition which does not state when the work was to be completed and money paid, may be bad on demurrer, but if an answer is put in and the case is tried, and the proof shows that time for completion and payment was within the statutory period, it is too late to raise the objection on appeal.<sup>2</sup> So, where the suit is in the nature of a chancery proceeding, and a trustee was made a party only, and not the *cestui que trust* within the statutory period, and the objection was not in any way set up in the court below, it was held that it could not be enforced on appeal as the statute of limitations should have been pleaded or insisted on by the answer to have entitled a party to the benefit of it.<sup>3</sup> But the materiality of these allegations may be modified by statute, as where the only clause as to limitation of time is, that "no creditor shall be allowed to enforce his lien as against, or to the prejudice of, any other creditor or any encumbrance, unless suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due and payable," his lien does not cease as against the debtor, and the question of time, as to him, is not material. It is otherwise as to creditors existing at the time of the rendition of his judgment, whether the same were creditors prior or subsequent to the making of the contract under which he seeks to enforce his lien.<sup>4</sup> So, where it is provided that, "if the mechanic . . . fail to assert his rights within six months after the last payment shall have become due under his contract, the lien created shall not prevail against the rights of creditors of the party with whom the contract was made;" this limitation is for the benefit of creditors, and not of the debtor.<sup>5</sup> Upon a motion to dismiss a lien, because it appears by the record that it was not filed within the required ninety days, parol evidence is admissible to show that it was so filed.<sup>6</sup> Where a builder's lien, which had to be filed within sixty days, was filed Feb. 7, 1879, and stated that the work was completed Dec. 9, 1878, it was held, upon a petition to foreclose the lien, the original owner being the sole respondent, that, in the absence of any interest of third parties, or proof of injury to the respondent, the peti-

<sup>1</sup> Skyrme v. Occidental Mill, 8 Nev. 219.

<sup>2</sup> Brown v. Lowell, 79 Ill. 484.

<sup>3</sup> Barstow v. McLachlan, 99 Ill. 646.

<sup>4</sup> Shaeffer v. Weed, 8 Ill. 511; affirmed in Rietz v. Coyer, 83 Ill. 28.

<sup>5</sup> Van Pelt v. Dunford, 58 Ill. 145; affirmed in Jennings v. Hinkle, 81 Ill. 185.

<sup>6</sup> Goulding v. Smith, 114 Mass. 487.

tioner might show that December 9 was written by mistake for December 17.<sup>1</sup>

§ 332. **Computation of Time.**—The general rule as to the computation of time within which the notice or claim of lien must be filed or suit instituted, is, that the first day is to be excluded, and the last included.<sup>2</sup> It is thus expressed in another case, the day upon which the last item in the account is charged, being regarded as an entirety, or mere point of time, is to be excluded in the computation of the time within which the lien claim may be filed.<sup>3</sup> Accordingly a lien filed upon Dec. 2, for a claim dated June 2, is within the six months required by law.<sup>4</sup> In New York the law says "no lien provided for in this act shall bind the property therein described for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to enforce the same; and if the action is in a court of record, a notice of pendency of such action is filed with the county clerk," etc. The notice of lien was filed on June 25, 1885, and the notice of the pendency of the action was filed June 25, 1886. It was held that the lien was filed in time, as one year after June 25, 1885, embraced the whole of June 25, 1886.<sup>5</sup> In computing the year within which the lien expires, the day of filing the notice is to be excluded, therefore a notice filed Jan. 9, 1872, was duly continued by an entry made on the docket on Jan. 9, 1873.<sup>6</sup> Again it has been said that where "such lien shall not continue longer than the said period of six months, unless a claim be filed at or before the expiration of the same period," in computing this time, either the day on which the last work was done, or the day on which the claim is filed, must be excluded.<sup>7</sup> A claim filed July 23 is too late for materials furnished January 22 in the same year.<sup>8</sup> So a claim filed June 16, 1876, for materials furnished Dec. 15, 1875, is too late, and will be stricken off on motion.<sup>9</sup> So, if a notice must be given ten days before filing claim of lien, a notice served on Sept. 1, when the lien is filed on the 10th, is not a compliance with the law.<sup>10</sup> Courts have frequently been embarrassed in computing the time when the last day falls on Sunday. The decisions are not harmonious. In Oregon, a lien

<sup>1</sup> *Westland v. Goodman*, 47 Conn. 83.

<sup>2</sup> *Hahn v. Dierkes*, 37 Mo. 574.

<sup>3</sup> *Trustees Ger. Luth. Ch. v. Heise*, 44 Md. 455.

<sup>4</sup> *Esler v. Peterson*, 1 Leg. Gaz. (Penn.) 303; s. c. 8 Phila. 303.

<sup>5</sup> *Hammond v. Shephard*, 50 Hun, 318.]

<sup>6</sup> *Haden v. Buddensick*, 6 Daly N. Y., 3.

<sup>7</sup> *In re Martin*, 4 Fed. Rep. 208.

<sup>8</sup> *Hoops v. Parsons*, 2 Miles (Penn.), 241.

<sup>9</sup> *Hall v. Dougherty*, 14 Phil. 190.]

<sup>10</sup> *Schubert v. Crowley*, 33 Mo. 564.

law required "the account . . . to be filed within — months after the indebtedness shall have accrued," and the courts held that, where the last day fell on Sunday, the act might be done on the succeeding Monday.<sup>1</sup> In Missouri, on a statute using the precise phraseology as above, it was decided that when the time after the indebtedness accrued expired on Sunday, the lien failed, unless the account was filed on the Saturday preceding.<sup>2</sup> The weight of authority in respect to the construction of statutory acts is decidedly in favor of the latter decision, holding that when the last day for performance of a given act falls on Sunday, the act must be done on the preceding day.<sup>3</sup> In the construction of rules of court in respect of time for pleading and other matters of practice, it is well settled that if the last day fall on Sunday, the party has the whole of the next day in which to perform the act required. So, on contracts in regard to which no days of grace are allowed. There, if the specific time for payment or performance fall on Sunday, the debtor has the following Monday on which to discharge his obligation. But in commercial law, where days of grace are allowed, the rule has always been different; and where a bill or note falls due on Sunday, it is payable on the previous Saturday. In the construction of statutes, this principle has generally been held the same. Thus, in one case,<sup>4</sup> the question was, whether an appeal from a justice's judgment was regular if brought on Monday, where the time limited by the statute (ten days) expired on the day before. The court held that it was not. The same doctrine was subsequently affirmed,<sup>5</sup> that where the period fixed by a statute for doing any act expires on Sunday, the act must be done on the preceding day; and intermediate Sundays are included in the computation.<sup>6</sup> Where a statute provides that where a sub-contractor upon a railroad claims a lien for labor, he "shall have sixty days from the last day of the month in which such labor was done" to file his claim, the word month is used in its calendar sense, and the claim must be filed within sixty days from the last day of the calendar month in which work was performed.<sup>7</sup>

§ 333. **Necessity for Independent Proceedings by Claimant.** — Where material-men must commence proceedings to foreclose their liens within a certain time from the date of filing their lien

<sup>1</sup> Carothers v. Wheeler, 1 Oreg. 194.

<sup>2</sup> Patrick v. Faulke, 45 Mo. 312.

<sup>3</sup> Sedgwick, Stat. & Const. Law, 420.

<sup>4</sup> Ex parte Dodge, 7 Cow. (N. Y.)

<sup>5</sup> Broome v. Wellington, 1 Sandf. (N. Y.) 664.

<sup>6</sup> Patrick v. Faulke, 45 Mo. 312.

<sup>7</sup> Sandval v. Ford, 55 Iowa, 461.



notices, the fact of a lien-holder being made a party defendant by a plaintiff in a suit to enforce a mortgage does not release him from the obligation of strictly pursuing his statutory remedy, by commencing an action or filing a complaint. The answers of the claimants in such case simply advise the court of the fact that they have some interest in the mortgaged premises, which requires the interposition of a court of equity to secure or preserve. When the original suit is disposed of within the statutory period from the date of their lien notices, then their interest in the mortgaged premises may be ascertained and fully adjudicated; but when they see the time limited to them by statute rapidly passing away, without any probability of a final decree being entered in the original foreclosure suit, it is their duty to commence their suit to foreclose the liens in the manner and form provided by statute.<sup>1</sup> An analogous case has also been decided in the same manner, in which it was held that, during the period within which the lien may be filed, the equity court can recognize the lien on the property, or keep its proceeds in court subject to the lien, if proper proceedings are taken to enforce it; and it may, perhaps, obtain jurisdiction so far over the subject-matter as to order the lien to be discharged by payments, if it be brought to a close within the limitation allowed, or if proceedings be still pending for that purpose. But it can give no judgment ordering the property to be sold to satisfy the lien either before or after the lien expires.<sup>2</sup> So, in another State, it has been held that the fact of the party in whose favor a notice of lien is filed being made a party to a foreclosure suit of the premises, does not release him from instituting such proceedings as the statute requires to bring it to a close.<sup>3</sup> If, however, a statute authorize that "said liens may be enforced by suit in any court of competent jurisdiction . . . with publication notifying all persons holding liens under provisions of this act to appear and to exhibit proofs of said liens," a suit to enforce a particular lien under the act is a proceeding to enforce all the liens against the property; and an intervention in a suit already pending, if filed within the period allowed, is as much a compliance with the act as an original suit. But if the intervenors fail to connect themselves with the proceedings until their lien has expired by lapse of time, the pendency of the previous suit will not avail them.<sup>4</sup> So, if an act provide that in suits to

<sup>1</sup> *Coggan v. Reeves*, 3 Oreg. 275.

<sup>8</sup> *Noyes v. Burton*, 17 How. Pr. (N. Y.)

<sup>2</sup> *Noyes v. Burton*, 29 Barb. (N. Y.) 449.

<sup>4</sup> *Mars v. McKay*, 14 Cal. 127.

enforce mechanics' liens "all persons interested in the property charged with the lien may be made parties, and if they are not made parties, they may, on application to the court at any time before judgment, become parties;" and creditors may contest each others' right as to the lien and as to the amount due; and lien creditors are to share *pro rata* in the proceeds of the property; and the proceeding is to be governed by chancery rules, — the better practice in such case has been held to be for creditors who seek to establish a lien in a pending suit to file a bill in the nature of a cross-bill, setting forth the facts respecting the lien in the same way as if the bill were original, and making the debtor and all other parties to the suit defendants therein.<sup>1</sup> An answer by another mechanic setting up claim of a like lien is in the nature of a cross-bill.<sup>2</sup> In another case it has been decided that a lien-claimant, who is made a defendant by another lien-claimant in an action to foreclose this lien, in which all the equities of the parties might be passed upon, should not file a lien to protect his own claim on the same premises, and arising out of the same transaction, where the questions and defence are essentially the same; and if he do, his action may be dismissed on the motion of the owner. This motion should be made at the earliest possible moment. Any laches of the owner increasing the cost must be borne by himself.<sup>3</sup> In whatever way creditors who are defendants are allowed to assert their demands, they must observe the same strictness in pleading that is required of the party who institutes the suit. If the defendant creditor set up a lien in his answer, an opportunity should be afforded the debtor and all other parties to the suit to resist his demand.<sup>4</sup>

§ 334. **Commencement of Suit.** — When suit is required to be commenced "within six months after filing the lien," and the lien was filed on May 6, and a complaint was filed on Oct. 30 following, on which no summons was issued, but an amended complaint was filed on Jan. 26, 1857, and summons issued thereon, the time had expired and lien failed, as the suit was not commenced until the issuing of the summons.<sup>5</sup> Although, if it be provided that "such suit shall be commenced by petition," etc., the commencement of the suit is "the filing the petition," and not the suing out of the writ, as in ordinary suits

<sup>1</sup> Ford Gold Mining Co. v. Langford, Colo. 62.

<sup>4</sup> Ford Gold Mining Co. v. Langford, 1 Colo. 62.

<sup>2</sup> Culver v. Elwell, 73 Ill. 536.

<sup>5</sup> Green v. Jackson Water Co., 10 Cal.

<sup>3</sup> Graff v. Rosenberg, 6 Abb. Pr. N. S. 374. (N. Y.) 428.

at law.<sup>1</sup> Under other statutes it has been held that the filing of a statement of claim in the clerk's office is not a commencement of suit as contemplated when enacted that "the process is to be commenced within six months," etc., and, accordingly, a claim may be made and filed before the debt becomes due;<sup>2</sup> but no *scire facias* can be brought until the term of credit has expired,<sup>3</sup> nor the lien be enforced by judgment and execution before the maturity of the demand.<sup>4</sup> Where no mechanic shall be allowed to enforce his lien "as against or to the prejudice of any other creditor, or any incumbrance unless suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due and payable," and a suit was brought against the contracting party to enforce a mechanics' lien within six months after the last payment became due, but an incumbrancer and a purchaser under the incumbrance were not made parties within such time, but were brought into the case by amendment after the expiration of the statutory period, it was held that no lien could be enforced as against such new parties, to affect their rights.<sup>5</sup> So, where it is provided that no mechanics' lien shall be enforced "as against or to the prejudice of any other creditor, unless suit be instituted within six months after the last payment shall have become due and payable." The remedy given is purely statutory, and unless enforced in the manner and within the time prescribed in the statute, it cannot prevail against other creditors, and if one not made a party at the time of filing the petition shall afterwards be made defendant, as to such defendant the suit will be regarded as commenced at the time he was made a party, and not before. It is not sufficient to make a trustee party; the owner of the indebtedness himself, as his interest alone is to be affected by the decree, is an indispensable party.<sup>6</sup> Again, under the same statute, the time of a creditor, whose rights are to be affected, being made a party, either in the original proceeding or by amendment, must be regarded as the time of the commencement of the suit as to him; and if he is not a party his rights will not be affected, although the suit was instituted in time as to others.<sup>7</sup> Again, where some materials were furnished by a firm which was then dissolved by the withdrawal of a member, and a new firm, composed of the balance of the partners, furnished the

<sup>1</sup> *Christian v. O'Neal*, 46 Miss. 669.

<sup>2</sup> *Sweet v. James*, 2 R. I. 270.

<sup>3</sup> *Thomas v. Turner*, 16 Md. 105.

<sup>4</sup> *Hicks v. Branton*, 21 Ark. 186.

<sup>5</sup> *Crowl v. Nagle*, 86 Ill. 437; *Dunphy v. Riddle*, 86 Ill. 22.

<sup>6</sup> *Clark v. Manning*, 95 Ill. 580; s. c. 4 Bradw. (Ill.) 649.

<sup>7</sup> *McGraw v. Bayard*, 96 Ill. 154.

balance of the materials with the consent of all parties, and the old firm filed a petition to enforce a lien for the materials furnished by both firms, it was held that this was a good commencement of suit to enforce the lien for the subsequently delivered materials, when it was competent to amend by making the new members parties.<sup>1</sup>

§ 335. **Renewal of Claim.** — Within the period allowed by law, the claim may be renewed as often as the exigencies of the case may demand.<sup>2</sup> In this respect it is precisely like an action by writ, always open to the party until barred by the statute of limitations or an adjudication upon merits. A plaintiff in a *scire facias* upon a mechanics' lien, who has been nonsuited, may accordingly file another claim for the same demand, if within the statutory limitation, and proceed thereon, though the former claim remains on the records of the court.<sup>3</sup> So, if an attempt has been made to file a joint lien, it does not prevent the several lien-claimants from filing valid individual liens.<sup>4</sup> A misdescription of lien on which a judgment was taken and which is so far void as not to be enforceable, will not operate as a merger so as to defeat the filing of a new claim within the time allowed by law.<sup>5</sup> A party may also, for safety, duplicate his claim on the record, — as when he is uncertain of, or made a mistake in the name of the owner, or other important particular.<sup>6</sup> But in another State, where the notice of lien had to be filed within six months after work performed, and suit to be brought within three months after claim filed, it was held that, if a party file his lien, and fail to bring suit thereupon within ninety days, he cannot afterwards file a second lien, although within six months from the accruing of the account, and thus cure his neglect.<sup>7</sup> Where a lien must be prosecuted within one year after the debt becomes due, and if the first proceeding to foreclose, made within twelve months, be defective, and is dismissed, it cannot be renewed within six months thereafter, under a law that declares "if a plaintiff shall be nonsuited, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case," as such law applies only to ordinary suits and remedies, and not to extraordinary summary remedies.<sup>8</sup> A mechanic can

<sup>1</sup> Work v. Hall, 79 Ill. 197.

<sup>2</sup> Chambers v. Yarnall, 15 Penn. 265.

<sup>3</sup> Bournonville v. Goodall, 10 Penn. 133.

<sup>4</sup> Skyrme v. Occidental Mill Co., 9 Nev. 219.

<sup>5</sup> Gray v. Stevenson, 50 Iowa, 172.

<sup>6</sup> Highfield v. Pierce, 3 Phila. 507.

<sup>7</sup> Mulloy v. Lawrence, 31 Mo. 583.

<sup>8</sup> Walker v. Burt, 57 Ga. 20.

have but one lien for the same demand, and if he lose the first by his laches, he cannot by subsequent proceedings obtain a new one, as the second will be a nullity; but if the first be inoperative and not sustained by any statute, the claimant may file another, if the prescribed time has not expired.<sup>1</sup> So, where a lien which is defective has been filed, and the property against which it is entered is sold by the sheriff before the expiration of the statutory limit, a new claim may be made upon the fund with the same effect, if made within the period allowed by law, that it could be made, if a lien sufficient in form and substance had been entered of record before the sale.<sup>2</sup>

§ 336. **Failure of Officer to file Lien.**<sup>3</sup> — Where a party has complied with the statutory requirements, but the officer charged with official duty has failed in reference thereto, innocent parties who have dealt with the property will not be prejudiced. When affidavits of lien are handed to the clerk for him to issue executions upon them, they are filed in his office, and his failure to make the entry of filing does not defeat the lien.<sup>4</sup> Thus, if a "lien shall not continue longer than the period of six months, unless a claim be filed at or before the expiration of the same period," and "it shall be the duty of the prothonotary of . . . to procure and keep a book or docket . . . in which he shall cause to be entered and recorded all claims that may be filed by virtue of this act, together with the day of filing the same," etc., and a mechanics' lien is filed on the last day of the six months, but not entered on the lien docket until next day, it is good as to the owner and prior encumbrancers, and also as to those encumbrancers who are subsequent to the entry in the lien docket, but not as against *bona fide* purchasers, or encumbrancers who purchased in the interim of the expiration of the six months and the entry.<sup>5</sup> The filing is the actual delivery of the paper to the clerk without regard to any action that he may take thereon. If the clerk commits a clerical error, or makes a mistake in reference to the time at which he received the paper, that will make no difference. His indorsement is *prima facie* evidence of its truth; still it is competent to show by clear evidence his mistake, which the court will correct.<sup>6</sup>

<sup>1</sup> Davis v. Schuler, 38 Mo. 24.

<sup>2</sup> Schraeder v. Burr, 10 Phila. 620.

<sup>3</sup> See § 297.

<sup>4</sup> [Floyd v. Chess-Carley Co., 76 Ga. 752.]

<sup>5</sup> Speakman v. Knight, 3 Phila. 25.

<sup>6</sup> Grubbs v. Cones, 57 Mo. 84.

## CHAPTER XXX.

## NOTICE AND CLAIM.

§ 337. **Necessity of Notice.**<sup>1</sup>—The first act required to fix or perfect this lien, under most of the systems designed for its enforcement, is a notice or claim of lien. The necessity and justice of this provision is apparent, since real estate in the possession of another is to be charged with what would otherwise be a secret lien. In questions of personal property, possession and enjoyment are *indicia* of the right of the party in possession, whatever it may be. So possession of real estate is sufficient to put a person on inquiry as to the right of the party in possession. But inasmuch as the mechanic, in the absence of special agreement, is never technically in the possession of the freehold, and at most only in charge of the premises for the purposes of building, which are surrendered to the owner on completion, public convenience, where alienations are so frequent as in this country, requires notice in some public office, within a reasonable time, to which those who give credit or become purchasers may have access, and the means of information afforded. Consistently with this policy, legislatures, when they gave the mechanic and material-man this lien, guarded it against the mischief of secrecy, by providing reasonable limits within which it must be noticed and enforced.<sup>2</sup> Ordinarily, no written notice is required in favor of the lien, while the construction or repair is being made, or the materials being delivered, or for some months thereafter. These, while in progress, operate as a constructive notice to third persons, who must take notice at their peril, the same as in the case of the rights of actual occupants of the premises. But after the expiration of a few months, and the making of such structure, repair, or contribution of material is no longer recent, without other than such constructive notice, the lien should terminate.<sup>3</sup> That the owner of the building is a partner in the firm with whom the contract is made does not dispense with the necessity of giving him notice as owner.<sup>4</sup>

<sup>1</sup> [See § 63.]

<sup>2</sup> Williams v. Tearney, 8 Serg. & R. 58.

<sup>3</sup> Thomas v. Huesman, 10 Ohio St.

<sup>4</sup> [Reindollar v. Flickinger, 59 Me. 469, 474]

§ 338. **When required by Statute must be complied with.**<sup>1</sup>—The decisions are unanimous that when a notice is required by statute either to create or continue the lien, it is matter of substantial requirement, and must be complied with on the part of the claimant.<sup>2</sup> Thus, where it was provided that parties “shall, upon filing the notice prescribed, have a lien,” etc., it was held to be indispensable to the creation of the lien that the prescribed notice be filed.<sup>3</sup> So, where the law required that “all claims filed shall be in detail, specifying all materials furnished or labor performed, and at what date it was performed, in case of contract or otherwise,” these requirements must be substantially observed, and if not, there is no lien.<sup>4</sup> Another statute required notice of claim to be given a certain number of days before suit brought; the notice was indispensable, and without it the lien was utterly void.<sup>5</sup> Again, where the law required material-men who had furnished materials to a contractor “to give a notice in writing to the owner, at the time the work is begun or materials furnished,” this requirement must be strictly complied with; and if they do not, they have no lien against the owner, with whom they have no privity of contract.<sup>6</sup> This most salutary provision being not only for the benefit of the owner, but of all parties interested, it cannot be waived by consent of the owner as against any one except himself, so as to affect the rights or interests of third persons having liens on the property.<sup>7</sup> So strictly are the statutory requirements to be complied with, that although a general appearance of a defendant may waive defects in the institution of the foreclosure proceedings, yet it does not waive any defect in the previous notice to create the lien.<sup>8</sup> Personal knowledge of the indebtedness to the claimant does not supply the failure to file the notice. As where a lien is created only “upon filing a notice,” and before such a purchaser acquired the property, he was held not responsible for materials furnished before the sale, although he became the purchaser with notice of the amount due the claimant.<sup>9</sup>

§ 339. **When not required.**—This requirement of notice is purely statutory. Where the law does not, either by express

<sup>1</sup> [Approved in *Neeley v. Searight*, 113 Ind. 316, 322.]

<sup>2</sup> *Parks v. Crockett*, 61 Me. 490; *Hoyt v. Glenn*, 54 Ga. 571.

<sup>3</sup> *Beals v. Cong. B'nai J.*, 1 E. D. Smith, 654.

<sup>4</sup> *Wray v. Harris*, 77 N. C. 78.

<sup>5</sup> *Davis v. Schuler*, 38 Mo. 24.

<sup>6</sup> *Shelby v. Hicks*, 5 Sneed (Tenn.), 197; *Stewart v. Christy*, 15 La. Ann. 325.

<sup>7</sup> *M'Kim v. Mason*, 3 Md. Ch. D. 186.

<sup>8</sup> *Beals v. Cong. B'nai J.*, 1 E. D. Smith, 654.

<sup>9</sup> *Sinclair v. Fitch*, 3 E. D. Smith, 677.

terms or by fair legal construction, require a notice to be given or filed, none will be necessary in order to secure the lien.<sup>1</sup> And where notice is required of a party standing in one relation in order to bind the owner, it does not follow that notice will be required of those without this statutory qualification. For example, it was provided as to the material-man who dealt with a contractor, that his "lien for materials furnished shall not attach unless the person furnishing the same, before so doing, gives notice to the owner of the property to be affected by the lien, if such owner is not the purchaser;" under this law, a material-man selling to a contractor must give notice to the owner; but, if he sell directly to the owner, no notice is necessary.<sup>2</sup> So, where it was expressly enacted that "the failure to file the claim should not operate to defeat the claim or demand, nor the lien of the person supplying the labor, etc., against the owner nor the contractor, nor as against any one except purchasers or encumbrancers without notice," etc., a failure to file the claim within the prescribed period did not operate to defeat the lien against the owner.<sup>3</sup> In some courts, in accordance with the principle that occasioned the enactment of the last preceding statute, it has been decided that, as between the mechanic and the owner of the improvement, a literal compliance with the provisions of the statute in regard to the filing of an account, etc., is not necessary; yet in the same courts where cases have arisen between lien-claimants and other contestants for priority, the mechanic has been held to show strict performance of the requirements of the statute to entitle him to its benefits.<sup>4</sup> It has been held, under a statute that "every such debt shall be a lien, as aforesaid, until the expiration of six months after the work shall have been finished or materials furnished, although no claim shall have been filed therefor, but such lien shall not continue longer than the said period of six months, unless a claim be filed," etc., that a failure to file a claim is excused or supplied by a sheriff's sale of the building within six months from the time at which the work was done, thus freeing the building from all existing liens, and rendering it unnecessary to place them on record for the information of subsequent encumbrancers and purchasers, for whose benefit the record is principally designed.<sup>5</sup> Where the failure to file the notice "shall not operate to defeat" the lien or claim, "except against purchasers

<sup>1</sup> *Shoop v. Powles*, 13 Md. 304.

<sup>2</sup> *Whitford v. Newell*, 2 Allen (Mass.), 424.

<sup>3</sup> *Kidd v. Wilson*, 23 Iowa, 464.

<sup>4</sup> *Murray v. Rapley*, 30 Ark. 568.

<sup>5</sup> *Young v. Elliott*, 2 Phila. 352.



or encumbrancers without notice, whose rights accrued after the ninety days and before the lien is filed," a mortgagee cannot avail himself of this default, where the amount between the subcontractor, contractor, and owner has been settled by judgment.<sup>1</sup>

§ 340. **Nature of Notice.**—The nature of a notice or claim of lien depends entirely upon the terms of the statute, or the office it is to serve. In those States where it is to be filed in some public office of record, to be followed by *scire facias* at law, or by petition or bill in chancery, the filing of the notice is not the institution of the suit, but a preliminary step—entirely *ex parte*, and not conclusive on the defendant—by which the lien is to be secured, if the proper subsequent proceedings are taken.<sup>2</sup> The claim is not a record. If it be made the duty of the officer with whom it is to be filed to record it, the lien docket becomes the record, and the latter alone affects encumbrancers or purchasers, who need only examine it, and not the claim itself.<sup>3</sup> Accordingly, under a statute which merely requires the holder of a lien to file in the office of the county recorder a just and true account of the demand due him, and makes it the duty of the recorder to record the account so filed in a book provided for the purpose, it has been further held it is not necessary that the account should remain in the office after it is recorded. The object of the statute is to give notice to the public of the existence of the lien, and this is as well accomplished by the record alone as by both record and account. To hold that such removal destroys the lien would be a harsh and illiberal construction of the statute.<sup>4</sup> This registry of the lien is a record only in the sense of the registry of a mortgage, and is no such record as would on *scire facias* make the plea of *nul tiel record* applicable.<sup>5</sup> Neither is a claim filed in the nature of a judgment pronounced by a court; it is but a means partaking of the character of process of enforcing a statutory lien.<sup>6</sup> Ordinarily this notice is to be filed as a warning of the claim of the mechanic, and is not the bringing of a suit to enforce the lien.<sup>7</sup> The notice of a subcontractor to the owner is not the foundation of an action, and is not a necessary part of the complaint.<sup>8</sup> The complaint and suit follow as a distinct proceeding in the appropriate court hav-

<sup>1</sup> Brooks v. Railway Co., 101 U. S. 443.

<sup>2</sup> Brackney v. Turrentine, 14 Ark. 416.

<sup>3</sup> Armstrong v. Hallowell, 35 Penn. St. 485.

<sup>4</sup> Mars v. McKay, 14 Cal. 127; [Bell v. Teague, 85 Ala. 211, 214, citing Phillips, § 340, as authority.]

<sup>5</sup> Davis v. Church, 1 Watts & S. (Penn.) 240.

<sup>6</sup> Knabb's Appeal, 10 Penn. St. 186.

<sup>7</sup> McMurray v. Taylor, 30 Mo. 263; Wheeler v. Schroeder, 4 R. I. 383.

<sup>8</sup> School Town v. Gebhart, 61 Ind. 187.

ing jurisdiction. Where, however, the court may, on the day named in a notice served on an owner, give judgment as in an action, the service of the notice is in effect the commencement of a suit.<sup>1</sup> It is a substitute in effect for a summons in an ordinary action;<sup>2</sup> but such a notice must advise the owner of the fact of the lien, and such other facts as the statute requires.<sup>3</sup> So, where an action is "commenced by serving a notice containing a statement of facts constituting the claim," it is, as it takes the place of a complaint, to be subject to the rules governing that for which it is a substitute, and should show facts sufficient to constitute a cause of action.<sup>4</sup>

§ 341. **Effect of Notice.** — The effect of filing the notice required by statute in the proper office, in the period given for the purpose, is notice to all the world.<sup>5</sup> So, when filing of an account and affidavit, and entering an abstract upon the judgment docket, is made necessary, and this is done, it is constructive notice of the claim to all persons,<sup>6</sup> and therefore operates as an encumbrance.<sup>7</sup> It cannot be read in evidence to the jury that the work or materials were in fact furnished, nor of their sale and delivery; it can only be shown as a *narr.* or statement of the plaintiff's claim, to which the evidence of sale and delivery is to apply.<sup>8</sup> In many systems the remedy given mechanics or material-men dealing with contractors, and not with the owners, is either a lien on the property to the extent of the funds in the hands of the owner which are due the contractor, or a right against the funds, without the lien, to be acquired by notice to the owner. The notice, when such is the relation of the parties, operates in the nature of an attachment.<sup>9</sup> So that, where a law provides that a sub-contractor, etc., "shall upon filing the notice, have a lien," no lien attaches by the mere performance of work, but it is gained only by filing the notice prescribed by the act; and, until that notice is filed, the contractor, while acting in good faith may deal with and dispose of the indebtedness which may accrue to him under the contract as effectually as he may by law with any other maturing indebtedness, which the owner would be obliged to recognize, but not after notice.<sup>10</sup> So, where it is necessary that the notice should be specific as to

<sup>1</sup> *Brown v. Wood*, 2 Hilt. (N. Y.) 579; *Wasson v. Beauchamp*, 11 Ind. 18.

<sup>2</sup> *Reynolds v. Hamil*, 1 Code Rep. N. S. (N. Y.) 230.

<sup>3</sup> *McSorley v. Hogan*, Id. 285.

<sup>4</sup> *Dart v. Fitch*, 30 N. Y. Supreme Ct. 361.

<sup>5</sup> *Buck v. Brian*, 3 Miss. 880.

<sup>6</sup> *Spence v. Etter*, 8 Ark. 69.

<sup>7</sup> *Hoffman v. Walton*, 36 Mo. 613.

<sup>8</sup> *Hills v. Elliott*, 16 Serg. & R. 56.

<sup>9</sup> *Davis v. Livingston*, 29 Cal. 283; see § 61.

<sup>10</sup> *Oates v. Haley*, 1 Daly (N. Y.), 338.

the items of labor and materials to be secured, the lien will only exist for those set out in the notice; but this would not apply to extra materials which became necessary in consequence of defects in the specifications of the original written contract, — the notice being filed on the written contract as a basis.<sup>1</sup>

§ 342. **Form of.** — No particular form of notice is necessary. It is no objection to a notice that the lienor has no personal knowledge of the facts alleged. His source of information is of no consequence.<sup>2</sup> It should in substance comply with the requirements of the law, and no averment can be dispensed with that the statute makes necessary.<sup>3</sup> Thus, it is not sufficient simply to refer to the statute, unless it is so provided in the statute; but all the facts which under the statute constitute the cause of action must be alleged.<sup>4</sup> So, where "a claim or petition for the lien" must be filed, the claimant must specifically pray the court for a lien upon the premises. If this important step is omitted, innocent purchasers ought not to be prejudiced thereby.<sup>5</sup> The notice or claim ought in form to be so framed as to be unequivocally such a notice as is contemplated by the law. Where legislatures have prescribed the mode in which notice shall be given, courts of justice cannot dispense with it and substitute something else as an equivalent; and therefore, where notice of claim of lien had to be filed, taking a bond from the owner for the payment of the debt with warrant of attorney, and entering judgment on it, is not filing a claim or even instituting a suit to enforce this lien.<sup>6</sup> In a word, the notice should show affirmatively on its face that it is such an one as by the statute is authorized to be filed.<sup>7</sup> Thus, where the notice does not state that the sum claimed is after deducting all just credits and offsets, nor by whom the person claiming the lien was employed, nor to whom he furnished the materials, nor the terms of the contract, nor whether all the materials were furnished, each of which requirements are necessary by the statute, the notice is fatally defective, and no lien is created by filing it.<sup>8</sup> A void notice is as if none had been filed, and furnishes no foundation for a judgment of foreclosure of the lien.<sup>9</sup> In order to maintain a claim for lien against the owner of prop-

<sup>1</sup> McAuley v. Mildrum, 1 Daly (N. Y.), 396.

<sup>2</sup> Ward v. Kilpatrick, 85 N. Y. 417.

<sup>3</sup> Beals v. Cong. B'nai J., 1 E. D. Smith, 654; Hubbell v. Schreyer, 14 Abb. Pr. N. S. (N. Y.) 284.

<sup>4</sup> Kechler v. Stumme, 36 N. Y. Superior Ct. 337.

<sup>5</sup> McCarty v. Van Etten, 4 Minn. 461.

<sup>6</sup> Williams v. Tearney, 8 Serg. & R.

58.

<sup>7</sup> Smaltz v. Knott, 3 Grant Cas. 227.

<sup>8</sup> Fogarty v. Wick, 8 Daly (N. Y.), 166.

<sup>9</sup> Conklin v. Wood, 3 E. D. Smith, 662.

erty, it is essential to file with the clerk of the circuit court of the proper county, a just and true account of the demand due, after all just credits have been given and a true description of the property, with the name of the owner or contractor, or both, if known, which shall be verified by oath.<sup>1</sup> The affidavit must show that the labor or materials were furnished under a contract with the owner or his agent.<sup>2</sup> A notice is defective which shows that the goods were furnished to, or the labor performed for, a firm named in the notice, and not to, or for the owner directly, and which fails to show such a relation existing between the firm to whom they were furnished and the owner, as will bind the owner under the lien law.<sup>3</sup> When it can be fairly inferred from the notice (1) that a lien is claimed; (2) by whom it is claimed; (3) what amount is due, and that no credits are to be given; (4) what building is charged; (5) who is the owner, or that he is unknown, and the notice is verified by affidavit and signature of the claimant, it will be sufficient, though not symmetrical or perfect in form.<sup>4</sup> The notice must state the amount due, and describe the property, but need not name the time when the amount became due.<sup>5</sup> An affidavit must substantially conform to the statute, and one that omits to state to whom materials were furnished, or that the building was erected under contract with the owner of the land is fatally defective.<sup>6</sup> A lien statement under Gen. St. 1878, c. 90, is insufficient where it stated that J. owned the south half, and M. the north half of the lot, and that J. made a contract for himself and M., while in fact J. owned the whole, and contracted for himself alone.<sup>7</sup> The statement of lien must affirm that the materials were furnished for the building charged.<sup>8</sup> The notice need not state that a lien is claimed.<sup>9</sup> Under a law which gives a lien to "all persons furnishing timber, logs, provisions, or any other thing necessary to carry on the work of saw mills," it is not needful for one who supplies provisions, logs, or timber to affirm that they were necessary.<sup>10</sup> In Georgia the affidavit must allege that the plaintiff laborer demanded payment of "the owner, agent, or lessee."<sup>11</sup> But if the "employer was absent from the county when the work was

<sup>1</sup> [Burrough v. White, 18 Mo. App. 229.]

<sup>2</sup> [Clark v. Schatz, 24 Minn. 300.]

<sup>3</sup> [Warren v. Quade, 3 Wash. 750.]

<sup>4</sup> [Durling v. Gould, 83 Me. 134.]

<sup>5</sup> [Doane v. Clinton, 2 Utah, 417.]

<sup>6</sup> [Keller v. Houlihan, 82 Minn. 486.]

<sup>7</sup> [Conter v. Farrington, 46 Minn. 336.]

<sup>8</sup> [M'Glauffin v. Beeden, 41 Minn. 408, 411; § 358.]

<sup>9</sup> [Smith v. Headley, 33 Minn. 384.]

<sup>10</sup> [Bennett & Co. v. Gray, 82 Ga. 592, 596.]

<sup>11</sup> [Burke v. State, 74 Ga. 371.]

completed, and is still absent," the excuse is sufficient.<sup>1</sup> The demand must be on the "owner," etc., at the time the debt is due, and the lien is to be pushed. A demand on the person who owned the mill at the time the logs were furnished, but who has now ceased to be the owner, is not sufficient.<sup>2</sup> A demand made *before* the debt was due is insufficient, and an affidavit that does not show whether the demand was before or after that time, is defective.<sup>3</sup> The affidavit must state that the work was done by the claimant, and an averment that the defendant is indebted to the plaintiff for work done is not sufficient.<sup>4</sup> But the claim recorded need not show on its face that the material-man has complied with his contract.<sup>5</sup> A claim for materials "furnished to the saw-mill of B.," instead of furnished to B., follows the code, and is good.<sup>6</sup> The affidavit must show the jurisdiction of the court.<sup>7</sup> The Texas statute does not require the registered account to be accompanied by a statement of the interest or title of the owner in the encumbered property.<sup>8</sup> A statement of lien against several mining claims need not state that they are owned by the same person and worked as one mine. That may be left to averment and proof, or to proof alone if the defect in the pleadings is waived by answering over.<sup>9</sup> A lien claim as a contractor, when the contract set out shows the plaintiff to have been only a guarantor that the real contractor should fulfil his contract with the owner, is insufficient.<sup>10</sup> A notice describing the land, but failing to affirm that the building on which the work was done was on the land, is defective.<sup>11</sup> A notice stating that materials were to be paid for on the basis of what they were reasonably worth, is not properly found to be in "due form, as required by law," when the evidence shows that part of goods were furnished at an agreed price.<sup>12</sup> Where a claim filed for a mechanics' lien shows on its face that it is for work and labor done, etc., in the erection and construction of a building, but the details of what was done under the contract made a part of the claim, show that the work and materials were supplied for an alteration and addition to an old building, the two kinds of claims arising under differ-

<sup>1</sup> [Lindsay v. Lowe, 64 Ga. 438.]

<sup>2</sup> [Aiken v. Peck, 72 Ga. 434.]

<sup>3</sup> [Milam v. Solomon, 66 Ga. 55.]

<sup>4</sup> [Mabry v. Judkins, 66 Ga. 732.]

<sup>5</sup> [Ford v. Wilson, 85 Ga. 109, 114.]

<sup>6</sup> [Bennett & Co. v. Gray, 82 Ga. 592, 595.]

<sup>7</sup> [Lewis v. Frost, 69 Ga. 755.]

<sup>8</sup> [Gillespie v. Remington, 66 Tex. 108.]

<sup>9</sup> [Rico R. & M. Co. v. Musgrave, 14 Colo. 79.]

<sup>10</sup> [Dye v. Forbes, 34 Minn. 13.]

<sup>11</sup> [Warren v. Quade, 3 Wash. 750.]

<sup>12</sup> [Reed v. Norton, 90 Cal. 590, 594.]

ent acts of assembly, and being purely statutory in their creation, the claim is contradictory in averment, and will be stricken off on motion.<sup>1</sup> If a sub-contractor, when filing his lien in the circuit clerk's office, fails to give credit in his account for payments received by him from the contractor under whom he claims, and does so, not through inadvertence or mistake, but knowingly and intentionally, the lien filed is invalid regardless of the sub-contractor's reason for his action.<sup>2</sup>

§ 342 *a*. **Substantial Compliance as to Form is sufficient.** — In the notice of intent to file a lien substantial compliance with the statute is sufficient.<sup>3</sup> Mere informality is not fatal.<sup>4</sup> The construction will be liberal as to form, although the claim of lien must connect the owner of the estate charged with the contract for materials.<sup>5</sup> Yet if the contract relation of the plaintiff can be reasonably made out from the statement, it is sufficient, though informal.<sup>6</sup> A notice of lien which contains a statement of the demand in the following language: "After deducting all just credits and effects there is due" will be construed as complying with the requirement of the statute, that there is due a given sum "after deducting all just credits and offsets."<sup>7</sup> In a mechanics' claim it is not necessary that the exact words of the act of assembly should be used. Any equivalent words are sufficient.<sup>8</sup> A verified statement containing in substance all that the law requires is sufficient, though not in the statutory form.<sup>9</sup> The required notice to owner of property by the sub-contractor or material-man is sufficient, though meagre, in the following form: —

MR. WM. REEVES, — You are hereby notified that we will proceed to take a mechanic's lien on your house and lot in Johnson City, Tennessee, for work and materials furnished in erecting your house, unless said claim is paid. This November 21, 1890.

A. P. HENDERSON & Co.

But greater particularity in the notice is recommended.<sup>10</sup>

§ 342 *b*. **Errors of Form.** — Mistakes that do not tend to deceive the parties interested will be overlooked.<sup>11</sup> The absence

<sup>1</sup> [Morrison v. Henderson, 126 Pa. 216.]

<sup>6</sup> [Merriman v. Bartlett, 34 Minn. 524.]

<sup>2</sup> [Uthoff v. Gerhard, 42 Mo. App. 256.]

<sup>7</sup> [Merchant v. Humeston, 2 Wash. Tr. 433.]

<sup>3</sup> [Towner v. Remick, 19 Mo. App. 205.]

<sup>8</sup> [Taylor v. Wittkamp, 13 Phil. 31.]

<sup>9</sup> [St. Paul, &c. Co. v. Stout, 45 Minn. 327.]

<sup>4</sup> [Kautzen v. Hanson, 28 Neb. 595.]

<sup>10</sup> [Reeves v. Henderson & Co., 90 Tenn. 521, 522.]

<sup>5</sup> [M'Glaulin v. Beeden, 41 Minn. 408, 411.]

<sup>11</sup> [Cannon v. Williams, 14 Colo. 22.]

or informality of the caption to a notice will not defeat it.<sup>1</sup> A failure to state in the notice that the claim is due, does not invalidate it as between the original parties.<sup>2</sup> It is not necessary that the claim of lien should state that the amount specified to be due "is due over and above all just credits and offsets." It is sufficient if the substance of the statute is conformed to without adopting its phrase.<sup>3</sup> The plaintiff claimed that the notice of the Suitwieler lien was insufficient, as it did not state the nature and character of the materials furnished by Suitwieler. Held, that as the notice stated that the materials were furnished and used for the erection of the building in question, and as the plaintiff, the contractor, had engaged Poppet to do the painting and supply the materials that, as between the parties to this appeal, the notice was a sufficient compliance with the act, and that the plaintiff had not been misled to her injury by reason of the omission complained of.<sup>4</sup>

§ 342 *c.* **Correction of Error in Notice.** — If an imperfect recorded lien is corrected within the ninety days after furnishing materials allowed for filing the lien, it is saved, although the correction was made, not in the regular way, but by the clerk and plaintiff, and in violation of law so far as the clerk was concerned.<sup>5</sup> A notice to the owner is not in any sense process; and if there is any failure or error concerning it, the corrective must be applied on appeal or writ of error, and not in an application to set aside the judgment for defect of service or want of jurisdiction.<sup>6</sup>

§ 343. **When Notice to be written.** — Whenever the notice is required to be filed in any public office, or other expression is used in the statute indicating that something is to be done with it which would be impracticable with a verbal notice, it is manifest that a written notice will be as essential as if the statute had expressly so declared.<sup>7</sup> As where it is provided that the notice "shall be served by a particular officer," and that "his return shall be evidence," the notice to claim a lien must be in writing.<sup>8</sup> So, where the sub-contractor "shall give ten days' notice before filing the lien, as required by this act, to the owner, that he or they hold a claim against such building or improvement, setting forth the amount and from whom the same

<sup>1</sup> [Phoenix Iron Co. v. The Richmond, 6 Mackey (D. C.), 180, 185.]

<sup>2</sup> [Albrecht v. The C. C. F. L. Co., 126 Ind. 318.]

<sup>3</sup> [Kazartee v. Marks, 15 Oreg. 529; Whittier v. Blakesley, 13 Oreg. 546.]

<sup>4</sup> [Vogel v. Luitwieler, 52 Hun, 184.]

<sup>5</sup> [Sarles v. Sharlow, 5 Dak. 101, 109.]

<sup>6</sup> [Rumsey M'fg Co. v. Baker, 35 Mo. App. 217.]

<sup>7</sup> [Beals v. Cong. B'nai J., 1 E. D. Smith (N. Y.), 654.]

<sup>8</sup> [Jeure v. Perkins, 29 Iowa, 262.]

is due," it was held that, while it was not expressly said that the notice must be in writing, the general tenor, the object, and the policy of the act, and the nature of the thing, and especially the manifest and almost necessary import of the words, require a written notice.<sup>1</sup> Where a claimant "shall give ten days' notice before filing of the lien to the owner or his agent, that he holds a claim against such building, setting forth the amount," etc., held, the words "setting forth the amount" clearly imply that the notice must be in writing.<sup>2</sup> Where the law requires that notice of the written settlement with the sub-contractor shall be given to the owner, it is not sufficiently complied with by filing the settlement with the clerk within the period allowed for filing the lien, but he must give written notice of the filing to the owner. Any other than the written notice contemplated by the statute will not avail. Actual or constructive notice by the owner will not be sufficient.<sup>3</sup> But notice of a sub-contractor to an owner that he looks to him for payment need not be in writing, if none is required by the statute.<sup>4</sup> A verbal notice to the owner that material is being furnished to the contractor is sufficient. The word "notify" does not import writing.<sup>5</sup> A material-man's notice to the owner is sufficient, whether oral or written, if it puts the owner on his guard, and enables him to take steps to protect himself from loss.<sup>6</sup> But mere knowledge of the owner by matter *in pais* or by conversation with the material-man or mechanic, that certain work is being done or materials furnished by him without any affirmative act or declaration of the claimant to show an intention to claim the lien, and so put the owner on his guard, is not sufficient.<sup>7</sup>

§ 343 *a*. **When Contract must be filed with Written Notice.** — If the statute authorizing the lien requires the claimant to file a copy of the contract under which the work was done or materials furnished, it is important that the requirement be complied with. But where "the contract or copy of same" must be filed with statement, yet if it is prevented by the wrongful act of the party for whom the labor was performed, the lien is not lost; and parol evidence will be admissible to prove its contents.<sup>8</sup>

<sup>1</sup> *Schulenburg v. Bascom*, 38 Mo. 188; [*Miller v. Hoffman*, 26 Mo. App. 199.]

<sup>2</sup> [*Seibs v. Engelhardt*, 78 Ala. 508.]

<sup>3</sup> *Lounsbury v. I. M. & N. P. R. Co.*, 49 Iowa, 256.

<sup>4</sup> *McLeod v. Capell*, 63 Tenn. 196; [see § 63 *a*.]

<sup>5</sup> [*Vinton v. Builders, &c. Asso.*, 109 Ind. 351.]

<sup>6</sup> [*Newhouse v. Morgan*, 127 Ind. 436.]

<sup>7</sup> [*Caylor v. Thorn*, 125 Ind. 201, 204; *Neeley v. Searight*, 113 Ind. 316, 322, citing *Phillips*, § 338; *Albrecht v. The C. C. F. L. Co.*, 126 Ind. 318. Compare § 62 *c*; *Parker v. Dillingham*, 129 Ind. 542.]

<sup>8</sup> *McCormick v. Lawton*, 3 Neb. 449.



Where a statute requires that if "the contract or any part thereof is in writing, a copy of such writing must be filed with and made part of the claim," if there is no contract in writing, the notice need not contain any statement of the fact.<sup>1</sup>

§ 344. **To whom addressed.** — In those cases where the notice is merely to be filed for record in a public office, it is certainly doubtful whether the notice of intention to hold a lien need be addressed to any one; or, rather, whether it is not by force of law, addressed to every one. The lien created or preserved by it does not, as in case of a mortgage, arise by contract, but by operation of law. The notice is not an instrument *inter partes*. It is not necessary to be served on any one. It is to inform the public that the signer of it claims a lien on a certain piece of property for a certain amount, and in the body of the notice must appear all those facts directed by statute to be set out.<sup>2</sup> Entitling a notice as "Circuit Court, M. County. W. plaintiff v. D. defendant. The petition of W. shows to the court," etc., is immaterial.<sup>3</sup>

§ 345. **Name of Owner.** — Among the facts usually required to be set out in the notice is the name of the owner of the property, and, when the claim is made by a sub-contractor, also the name of the contractor with whom he dealt. When so required, these particulars are material. They are matters of substance, wisely provided for to give notice to owners that their property is sought to be charged, and to protect third persons, purchasers, mortgagees, and creditors, by apprising them of the alleged claim. No requisite is more important for these purposes than that the name of the owner should be stated.<sup>4</sup> Again, where "the name of the owner or contractor, or both, if known to the person filing the lien," are to be stated, the lien was held invalid unless the statute was complied with.<sup>5</sup> Where a statute provides that "the claim shall contain a brief statement of the contract or demand on which it is founded and of the amount due thereon, with a description of the premises and all other material facts in relation thereto," it must show with whom the original contract was made, and that such person had an interest in the premises. These omissions cannot be aided by the complaint.<sup>6</sup> So, if the statute require "the name of owner or reputed owner to be stated, if known," it is essential; and an averment to be made

<sup>1</sup> Smith v. Baily, 8 Daly (N. Y.), 128.

<sup>2</sup> Peck v. Hensley, 21 Ind. 344.

<sup>3</sup> White v. Dumpke, 45 Wis. 454.

<sup>4</sup> Beals v. Cong. B'nai J., 1 E. D.

Smith, 654; [Newman v. Brown, 27 Kan. 117, 121.]

<sup>5</sup> Hoffman v. Walton, 36 Mo. 613.

<sup>6</sup> Bertheolet v. Parker, 43 Wis. 551.

of ownership is not satisfied by a statement that the materials were purchased and the premises occupied by a party.<sup>1</sup> But an averment that A. B. is "the owner and reputed owner" is good, — the same person may be both.<sup>2</sup> A mechanics' lien is of statutory creation, and can be maintained only by a substantial observance of, and compliance with, the requirements of the statute. Therefore, where "the name of the owner must be given in the notice if known," the expression "and upon land now or formerly owned by B. R. and now occupied by F. R." is not positive as to the owner, and bad.<sup>3</sup> So where the law requires that the statement shall contain "the name of the owner or reputed owner," etc., to allege that A. B. "caused the buildings to be constructed" is not a sufficient allegation of ownership.<sup>4</sup> So in Maryland if the claim filed omits to state the owner or reputed owner, the omission is fatal.<sup>5</sup> So where, to constitute a valid claim, it is made obligatory that the contractor's name be set forth, and a lien against the property of a married woman was filed against husband and wife, but did not state that the wife contracted the debt, or that the husband was contractor for the building, the court considered that this direction of the law was imperative, which it could not disregard, and consequently there was no lien.<sup>6</sup> This requirement, that the name of the owner shall be alleged, is fulfilled by the simple statement of that fact, and does not require any averment as to who has title to the land. But in order to affect the land with the lien, the name of the owner thereof must be given in the notice. This requirement is one of substance, and it cannot be dispensed with. When the title to the house or structure and title to the land are in different persons, and the notice specifies the name of the owner of the building or structure, but not the name of the owner of the land, the lien may attach to such building, but not to the land.<sup>7</sup> So, where the lien claim is required to state "the name of the owner of the land, or of the estate therein on which the lien is claimed," the first allegation may be adopted.<sup>8</sup> Again, under a law that requires the notice to state the person against whom the claim is made and the name of the owner of the building, a notice which gives the

<sup>1</sup> Hicks v. Murray, 43 Cal. 515.

<sup>2</sup> [Arata v. Tellurium G. & S. M. Co., 65 Cal. 340.]

<sup>3</sup> Mayes v. Ruffners, 8 W. Va. 384; Stout's Adm'r v. Golden, 9 W. Va. 231.

<sup>4</sup> Hooper v. Flood, 54 Cal. 221; Phelps v. M. C. G. M. Co., 49 Cal. 337; Wood v. Wrede, 46 Cal. 637.

<sup>5</sup> [Reindollar v. Flickinger, 59 Md. 469, 472.]

<sup>6</sup> Ward v. Black, 7 Phila. 342.

<sup>7</sup> [Keartee v. Marks, 15 Ore. 529, citing Phillips § 345.]

<sup>8</sup> Cornell v. Matthews, 3 Dutch. (N. J.) 522.

name of the owner of the property, who has contracted to sell it to the party who made the contract with the lienor, sufficiently describes the owner within the provisions of the above law.<sup>1</sup> Failing by the exercise of reasonable diligence to ascertain the ownership of land, so as to make them parties defendant, they may be described and proceeded against as unknown owners.<sup>2</sup> When it is thus made necessary to state the name of the owner, a mistake will be fatal, as in a case where the name of George Tryon was given, when the real name was Jacob A. Tryon,<sup>3</sup> and again where the designation was Jewish Synagogue, while the corporate name was Congregation of B'nai Jeshurun.<sup>4</sup> So, where "the name of the owner must be stated, if known," and a party by mistake failed to give the true name, the owner's name being known, no lien was gained by the claim.<sup>5</sup> Again, where the statute required that the name of "the owner or reputed owner, if known, shall be contained in the notice of claim," and the notice stated that James M. was owner, but in the complaint the mechanic averred that James M. was not the owner, but that Elizabeth M. was, and that her name was erroneously omitted by mistake, and the name of James M. was inserted because he was informed and believed that James M. was owner, it was held that the notice was defective, and formed no basis for the action: James M. being the reputed owner merely, the notice should have so stated.<sup>6</sup> In Nevada it is essential to the validity of a lien, under the provisions of the statute, that the name of the owner or reputed owner of the building, improvement, or structure upon which the lien is sought to be enforced should be stated. If the name of the owner is unknown, that fact ought to be stated, and the name of the reputed owner given.<sup>7</sup> The omission of the owner's name in the notice and claim cannot be aided by any averments in the complaint, or by extrinsic evidence.<sup>8</sup> But certainty to a common intent has always been held sufficient; and while adherence to the terms of the statute is indispensable, the rule, it is declared, must not be pushed into such niceties as serve but to perplex and embarrass a remedy intended to be simple and summary, without, in fact, adding anything to the security of the

<sup>1</sup> *Riley v. Watson*, 10 N. Y. Supreme Ct. 568; s. c. 6 N. Y. Supreme Ct. 310.

<sup>2</sup> *Phoenix Mut. Ins. Co. v. Batchen*, 6 Bradw. (Ill.) 621.

<sup>3</sup> *Hays v. Tryon*, 2 Miles (Penn.), 208.

<sup>4</sup> *Beals v. Cong. B'nai J*, 1 E. D. Smith, 654.

<sup>5</sup> *Kelly v. Laws*, 109 Mass. 396.

<sup>6</sup> *McElwee v. Sanford*, 53 How. Pr. (N. Y.) 89.

<sup>7</sup> *Malter v. Falcon M. Co.*, 18 Nev. 209.]

<sup>8</sup> [*Id.*]

parties having an interest in the property sought to be affected.<sup>1</sup> A claim which names the owner of a lot, and affirms that he entered into a contract for the erection of a building on that lot, sufficiently designates the owner of the building.<sup>2</sup> The statement of the name of the person employing the lienor is sufficient if it enables the owner to tell whether the lienor claims as original or sub-contractor. And a statement "employed by the B. F. & Co." is sufficient without the name of the agent. The notice is to be liberally construed to effect the lien.<sup>3</sup> A statement that A. is the owner without adding "to the best of my information" is sufficient.<sup>4</sup> A notice of a lien sufficiently gives the name of the owner of the land where the building or erection was placed, which says: "Said real estate reputed to be owned by one E. R. H., and said building reputed to be owned by one G. M. R."<sup>5</sup> A notice of a claim filed with the county clerk sufficiently gives the name of the owner of the building, which says that the materials were actually used in repairing the said dwelling house and fence under the direction of W. F. O., who "was legally in possession of said premises under a contract of purchase and bond for a deed from S. M. & Co." So "building owned by W. F. O., deceased." "Further, furnished the materials upon said house at the request of W. F. O., the owner thereof." So when the notice recited that "the building was owned by W. F. O., and that the work was performed on said building at the request of W. F. O., the owner thereof."<sup>6</sup> A variance between the notice and the evidence as to the name of the person employing the plaintiff, which creates no substantial, practical difference in the liabilities as expressed in the notice, and which could not work any injury, is not fatal.<sup>7</sup> If the name of the owner or reputed owner is not known, nothing need be said about it, — it is not necessary to state in the notice that the name is not known.<sup>8</sup> A mistake in the Christian name of the employer is immaterial where it appears that the individual meant is sometimes known by the name used.<sup>9</sup> The fact that a notice of lien named A. as the person against whom the claim was made as a contractor, while in fact A. and B. were the contractors, will not necessarily vitiate it. In such case it is com-

<sup>1</sup> Knabb's Appeal, 10 Penn. St. 186.

<sup>2</sup> [Russ Lumber Co. v. Garrettson, 87 Cal. 589.]

<sup>3</sup> [Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 584.]

<sup>4</sup> [Hurlbert v. New Ulm Basket Works, 47 Minn. 81.]

<sup>5</sup> [Krossel v. Rowe, 19 Oreg. 188.]

<sup>6</sup> [Kzartee v. Marks, 15 Oreg. 529.]

<sup>7</sup> [Reed v. Norton, 90 Cal. 590, 596.]

<sup>8</sup> [West Coast Lumber Co. v. Newkirk, 80 Cal. 275. The law says: "Must state name of owner, or reputed owner, if known."]

<sup>9</sup> [Jewell v. McKay, 82 Cal. 144.]

petent for the lienor to show that, prior to the notice, the owner and A. had both stated to him that A. was the sole contractor.<sup>1</sup> So the omission from the body of a claim of the initial letter of the middle name of the owner is immaterial, as such an omission would not be material under the critical accuracy of common-law pleading. It can mislead no one.<sup>2</sup> A notice describing Benjamin F. Strimple as Frank Strimple, he being familiarly known under that name, sufficiently gives the "name of the contractor" as the law requires.<sup>3</sup> Where the claim shall contain "the name of the owner of such property, if known," it is no objection thereto that the initials only of the Christian name of the owner of the land are stated, although the person claiming the lien knows the full name.<sup>4</sup> So where it is a foreign name, and the spelling does not materially vary the sound, as Dierges for Dierkes, in the German language, or the party is as well known by one pronunciation as the other, it is not a misnomer.<sup>5</sup> The insertion of a superfluous name will not necessarily vitiate the notice.<sup>6</sup> Where the statement affirmed that materials were furnished to and for P., "agent and contractor" for H., the owner, when P. was really the owner at the time of furnishing, and vendor to H. since that time, the error was held immaterial. "The office of the statement is to give notice of the lien, not to serve as evidence of it."<sup>7</sup> But a verified statement of account that is very loose and indefinite about its statements of the ownership of the property, will not sustain the lien.<sup>8</sup> An affidavit that does not connect the person to whom materials are furnished with the owner of the building is defective.<sup>9</sup> A statement claiming a lien on property "owned by" defendant is insufficient, as it does not state that it was owned by him when the service was rendered.<sup>10</sup> In Nebraska the owner's name need not be stated in the affidavit. "While it would no doubt be good practice in an affidavit for a mechanics' lien to make the direct averment that the person with whom the contract was made was the owner of the property, yet we find nothing in the statute which would require technical averment as to such ownership." The language of the law is, "that the person entitled to the lien shall make an account in writing of the

<sup>1</sup> *Brown v. Welch*, 12 N. Y. Supreme Ct. 582.

<sup>2</sup> *Knabb's Appeal*, 10 Penn. St. 186.

<sup>3</sup> [*Steinmann v. Strimple*, 29 Mo. App. 478.]

<sup>4</sup> *Getchell v. Moran*, 124 Mass. 404.

<sup>5</sup> *Gorman v. Dierkes*, 37 Mo. 576.

<sup>6</sup> *Hauptman v. Catlin*, 20 N. Y. 247.

<sup>7</sup> [*Lax v. Peterson*, 42 Minn. 214, 221.]

<sup>8</sup> [*Rugg v. Hoover*, 28 Minn. 404.]

<sup>9</sup> [*Anderson v. Knudsen*, 33 Minn. 172.]

<sup>10</sup> [*Morrison v. Philippi*, 35 Minn. 192.]

items of his labor, skill, machinery, or materials, and after making oath thereto, — that is, to the account, — shall file the affidavit," or rather the account so verified, "in the office of the county clerk. It is true that the allegation of ownership is an essential averment of the maintenance of the action. But this averment, in our opinion, is required only in the petition for the foreclosure of the lien."<sup>1</sup> Where the statement filed in the registry of deeds is required to give "the owner's name, if known," a statement that "B. is the owner to the best of my knowledge" does not invalidate a petition against M. on learning that he is the owner.<sup>2</sup> An error in the name of the owner in the notice of claim in a mechanics' lien proceeding can be corrected in the complaint by setting forth the mistake and averring the true owner.<sup>3</sup>

§ 346. **Name of Corporation, etc.** — If the owners be a corporation, its corporate name should be used in the notice.<sup>4</sup> The transposition, interpolation, omission, or alteration of some of the words going to make up the name of a corporation is not material, if it make no essential difference in their sense. As where it was alleged that a contract was entered into by one of the parties, by the name and style of "The State Board of Education of Illinois," when by the act creating the corporation the name given to it was "The Board of Education of the State of Illinois." Although the words were transposed in the contract, the name and style remained substantially the same.<sup>5</sup> Putting the word "association" in place of "company" in the defendant's name is immaterial.<sup>6</sup> If the owners be not a corporation, but an unincorporated association, the individuals composing it should be made defendants in the proceeding to foreclose, and the notice should describe them either by their associate or joint name, or otherwise, so that they can be identified.<sup>7</sup> If there be several owners or contractors who are partners, the designation by their partnership name will be sufficient. Again, if there be several contractors, the notice is sufficient if it name one of them.<sup>8</sup> So, where it was necessary to give notice to the owner "from whom it was due," and the notice stated "Ross & Shane, contractors," when the claim was against Ross alone,

<sup>1</sup> [Hays v. Mercier, 22 Neb. 656, 661.]

<sup>2</sup> [McPhee v. Litchfield, 145 Mass. 565.]

<sup>3</sup> [Leiegne v. Schwarzler, 67 How. Pr. 131.]

<sup>4</sup> Beals v. Cong. B'nai J., 1 E. D. Smith, 654; Wilson v. Commissioners, 7 Watts & S. 197.

<sup>5</sup> Board of Ed. v. Greenbaum, 39 Ill. 610.

<sup>6</sup> [Instalment Building & Loan Co. v. Wentworth, 1 Wash. 467.]

<sup>7</sup> Beals v. Cong. B'nai J., 1 E. D. Smith, 654.

<sup>8</sup> Davis v. Livingston, 29 Cal. 283.

if the owner was misled to his injury by the mistake of the subcontractor, he ought not to suffer; but if he were not harmed by the error, it would not destroy the claim, and, in the absence of proof, it is not to be presumed that such injury resulted,<sup>1</sup> and is consequently not subject to demurrer for that cause.<sup>2</sup> So, where the notice of lien stated that the materials were furnished to A. & Co., when in fact they were furnished to A., this does not invalidate the lien.<sup>3</sup> So a claim of lien against the interest of several joint owners is good to hold the interest of the one who made the contract.<sup>4</sup> Where a city is sought to be charged by a material-man, and a notice is addressed to a building committee of the common council of the city that they will be held responsible, it does not fix a personal liability on the city.<sup>5</sup>

§ 347. **Name of Owner when there has been Transfer of Title during Progress of Work.** — During the progress of work changes frequently take place in the ownership of property, and it becomes important to determine which owner, the former or present, is to be named. Thus, where the law required "the name of the owner to be given," the provision was considered to be satisfied by mentioning the name of the person who was the owner when the work was commenced, as the mechanic ought not to be required to name any purchaser to whom the property may have been sold, particularly if there were no provision for bringing in a purchaser as terre-tenant.<sup>6</sup> In such case, however, the name of some person must be mentioned on the record; and if only the name of a deceased party be given, the lien is not valid. It was obligatory on the claimant to have found out the name of the heir on whom the property descended, and set out his name.<sup>7</sup> Where the name of the owner must be set out if known, and during the building the property was conveyed, the claimant may set out the name of the original owner and show that the conveyance was fraudulent and void as to himself, as a creditor.<sup>8</sup> But in another case it was said, although a lien is made by statute superior to a mortgage made subsequent to the contract of building, yet where it appeared that before the contract was made, the owner, who had then merely a bond for a deed for the land, borrowed a sum of money from his daughter,

<sup>1</sup> Putnam v. Ross, 46 Mo. 337.

<sup>2</sup> Roach v. Chapin, 27 Ill. 194.

<sup>3</sup> Tibbetts v. Moore, 23 Cal. 208.

<sup>4</sup> Hillburn v. O'Barr, 19 Ga. 591.

<sup>5</sup> City of Crawfordsville v. Irwin, 46 Ind. 440.

<sup>6</sup> Jones v. Shawhan, 4 Watts & S. 257;  
Sullivan v. Johns, 5 Whart. (Penn.)  
366.

<sup>7</sup> Northern Liberties v. Myers, 2 Pars.  
Sel. Cas. 239.

<sup>8</sup> Amidon v. Benjamin, 126 Mass. 276.

and told her he would give her a deed when he got one, and secure her on the place, that after he got his deed, without her knowledge, he caused a deed, conveying the property to her absolutely, to be executed and recorded, it was held that this evidence would warrant a finding for the daughter, on the ground that the judge must have found that the deed was made for a valuable consideration, and the daughter's name as owner not being mentioned, as it should be by the last preceding statute cited, the lien was lost.<sup>1</sup> A mistake in alleging with whom the contract was made, as where a party states in his notice that he is a sub-contractor, will not prevent him from subsequently, in a distinct personal action, suing the owner and averring a direct personal employment. The requisites to create an estoppel *in pais* are absent in such case. The declaration made by the plaintiff in the notice of lien, that he was employed by the contractor, is not inconsistent with the allegation that he was employed also by the owner.<sup>2</sup> Where it is necessary "to serve a notice specifying the amount of the claim, and the person against whom the claim is made, the name of the owner of the building," etc., this does not require a statement of the name of the person with whom the contract was made, but of the person against whom the claim is made, and the name of the owner of the building.<sup>3</sup>

§ 348. **Name of Claimant.** — In regard to the claimants, it is usually unnecessary to set out whether they claim as partners or individually.<sup>4</sup> Where the law provides that the notice to acquire a lien shall specify, "the amount of the claim and the person against whom the claim is made, the name of the owner of the building," etc., it does not distinctly require that the notice should state whether the plaintiffs claim as contractor, sub-contractor, or laborer of the party doing the work, although it is always better that the character of the party doing the work should be alleged. But if it be held, under such a provision, that the notice should show in what character the claimant performed the work, etc., where it appears from the proceedings that the parties furnished the materials and performed the work in pursuance of contracts made for the erection of the buildings, it is sufficient; and in the absence of any allegation that they did the work for other contractors, the fair presumption is that they, as contractors with the owner, did the work directly for

<sup>1</sup> *Amidon v. Benjamin*, 128 Mass. 537.

<sup>2</sup> *Hauptman v. Catlin*, 4 Abb. Pr.

<sup>3</sup> *Cremin v. Byrnes*, 4 E. D. Smith, (N. Y.) 472.

756.

<sup>4</sup> *Knabb's Appeal*, 10 Penn. St. 136.



him.<sup>1</sup> So, where the law requires "the names of the party claimant" to be set forth, the use of the firm name is a sufficient designation, without the use of the individual name of each member of the firm.<sup>2</sup> Where B. W. & Co. furnished materials, and the certificate filed with the town clerk ran "We, B. W. & E., co-partners under the name of B. E. & Co.," but was signed by the true name of the firm, it was held that the error did not invalidate the lien.<sup>3</sup> The omission of the Christian names of claimants is not available in a question of distribution.<sup>4</sup>

§ 349. **When Notice should set out Work done or Materials furnished.**<sup>5</sup>—It has been found necessary in the experience of this lien, and particularly in those States which have pledged the premises for the payment of debts due sub-contractors and others dealing not with owners, but with their contractors, that the notice or claim of lien should be specific as to the labor performed and materials furnished. Between them no privity exists, and every provision made necessary to fasten a lien upon the property of a stranger must be strictly complied with.<sup>6</sup> For while it is true these statutes were designed to confer a large license upon a most meritorious class of citizens whose interests they were intended to advance, courts have found it necessary, for the protection of others, to hold them to a compliance with their requisitions. Information as to the particulars of the work and materials, when it is exacted, ought to be entirely within their power to give, and an omission to put it on the record is without excuse. Indeed, the great object of the statute in pointing out the characteristics of the statement to be filed would in the end be utterly defeated, were courts to indulge the laxity of practice which ignorance and carelessness conspire to introduce and perpetuate.<sup>7</sup> Many reasons for such explicitness in the notice as to the character of the work and amount and kind of materials contributed to the building are apparent. It prevents fraud on the part of the sub-contractor and collusion by the contractor, enables the owner to ascertain the correctness and reasonableness of the demand, and gives the most definite information to purchasers and encumbrancers.<sup>8</sup> So, where it is required that the claim should set forth "the amount or sum claimed to be due, and the nature or kind of work, or the kind and amount of materials furnished," etc., a claim which states

<sup>1</sup> *Lutz v. Ey*, 3 E. D. Smith, 621 ; s. c. 3 Abb. Pr. (N. Y.) 475.

<sup>2</sup> *Black's Appeal*, 2 Watts & S. 179.

<sup>3</sup> *Shattuck v. Beardsley*, 46 Conn. 386.

<sup>4</sup> *In re Hill's Estate*, 2 Penn. L. J. 96.

<sup>5</sup> [See further in following sections.]

<sup>6</sup> *Davis v. Livingston*, 29 Cal. 283.

<sup>7</sup> *Noll v. Swineford*, 6 Penn. St. 187.

<sup>8</sup> *Carson v. White*, 6 Gill. (Md.), 17.

the amount, but fails to state what the claim is for, whether work or materials, would seem to be fatally defective.<sup>1</sup> As a consequence, a mechanics' lien upon a building covers only the materials and work employed on the building referred to in the notice.<sup>2</sup> No lien can be allowed for labor and materials not embraced in the claim and notice of lien, and such an item will be stricken from the decree in complainant's favor.<sup>3</sup> In Missouri the statute requires the notice to state "the amount claimed to be due, and on what account," etc., — that is, whether for work or materials in building, repairing, or what not; and a notice that makes no attempt to do this is fatally defective.<sup>4</sup> When the statute requires the notice to state whether all the work claimed for has been actually done, and if not how much of it remains unfinished, a notice that makes no attempt to comply with this provision is fatally defective.<sup>5</sup> Untrue statements in the notice as to materials and labor avoid the lien.<sup>6</sup> But mere surplusage does not vitiate the statement, as a claim for "construction, erection, alteration, and addition" to a building when the work was alteration and repair.<sup>7</sup> The fact that a lien account contains a number of items which were in the original bid, but for which no charge is made because they were never delivered, does not deprive the account of its character as a just and true account.<sup>8</sup>

§ 350. **When Items must be given.**<sup>9</sup> — Where the claimant must file a claim containing "a statement of the terms, time given, and conditions of his contract," the requirement is imperative. So of the other particulars required. Such a statute is not content with the legal inferences that might be drawn from facts stated in general terms. Non-compliance renders any lien sought to be established ineffectual and void.<sup>10</sup> The terms and conditions of the contract set forth in a claim of lien should include a sufficient description of the materials furnished or work done to enable the owner to intelligently determine as to the *bona fides* of such contract, and the reasonableness thereof.<sup>11</sup> In California it is held that the value of the materials

<sup>1</sup> Trustees Ger. Luth. Ch. v. Heise, 44 Md. 454.

<sup>2</sup> McAuley v. Mildrum, 1 Daly (N.Y.), 396.

<sup>3</sup> [Texas S. F. & N. R. Co. v. Orman, 3 N. Mex. 365.]

<sup>4</sup> [McKelvey v. Wonderly, 26 Mo. App. 631.]

<sup>5</sup> [Foster v. Schneider, 50 Hun, 151.]

<sup>6</sup> [Id.]

<sup>7</sup> [Appeal of Dickey, 115 Penn. St. 73.]

<sup>8</sup> [Schulenburg & Bockler Lumber Co. v. Strimple, 33 Mo. App. 154.]

<sup>9</sup> This section was cited with approbation in Ferguson v. Ashbell, 53 Tex. 249.

<sup>10</sup> Dugan v. Brophy, 55 How. Pr. (N.Y.) 121.

<sup>11</sup> [Warren v. Quade, 3 Wash. 750.]

need not be stated in the notice, nor the items of account, nor need the knowledge of the owner that they were furnished, be affirmed, neither is it necessary to state that the contract was performed, nor need anything subsequent to or outside of the contract, or implied by the law, be named in order to satisfy the requirement of stating "the terms, time given, and conditions of the contract;" only what was expressly agreed is requisite.<sup>1</sup> A notice which states that "by agreement the price of all materials furnished by C. was due on delivery of the same," sufficiently states the terms and conditions.<sup>2</sup> The nature of an alteration made need not be stated.<sup>3</sup> A claim setting forth the kind and number of days' work to be performed, the dates between which it was to be done, with the price per day, and the aggregate amount due, and that "the terms of payment were cash, as soon as said labor was performed," is a sufficient statement of "the terms, time given, and conditions of the contract."<sup>4</sup> Where it does not appear that there was any express agreement as to time within which the contract is to be completed, the above words of the statute "time given" do not apply, and the claim is good, though no time is named. The same is true in respect to the time of payment when none is fixed. And it seems that when the contract is otherwise fully stated, but no time named for completion or payment, the courts until the contrary be proved will presume that no time was agreed on, and that the time fixed by law was meant to govern the case.<sup>5</sup> When the contract is recorded, it is sufficient if the notice refers to it for the terms without setting them forth.<sup>6</sup> The affidavit under the Georgia code for materials furnished need not state the fact or the terms of the contract. It is sufficient to state that the materials were furnished.<sup>7</sup> A statute requiring an "account" to be filed does not mean a claim for the balance, but an itemized statement, and a failure to give the items will be fatal.<sup>8</sup> In Illinois in order to enforce a lien against any other creditor or incumbrancer, an itemized account must be filed in the office of the circuit clerk within four months after the last payment shall become due.<sup>9</sup> Where the statute requires that the notice shall set forth "the entire price for the

<sup>1</sup> [Jewell v. McKay, 82 Cal. 144, 150 et seq.]

<sup>2</sup> [Cohn v. Wright, 89 Cal. 86.]

<sup>3</sup> [Jewell v. McKay, 82 Cal. 144.]

<sup>4</sup> [Tredinnick v. Mining Co., 72 Cal. 73, 80, citing Blackman v. Marsicano, 61 Cal. 638, and Hills v. Ohlig, 63 Cal. 104.]

<sup>5</sup> [Savings & Loan Soc. v. Horton, 63 Cal. 105.]

<sup>6</sup> [San Diego L. Co. v. Wooldredge, 90 Cal. 574, 578.]

<sup>7</sup> [Bennett & Co. v. Gray, 82 Ga. 592, 596.]

<sup>8</sup> [Shackleford v. Beck, 80 Va. 573; Railroad v. Miller, 80 Va. 821, 825.]

<sup>9</sup> [McDonald v. Rosengarten, 134 Ill. 126.]

entire contract," and this is not done, the lien is lost.<sup>1</sup> The fact that the mechanic might sustain an action at law for the claim gives no right of lien, unless he substantially complies with the statute.<sup>2</sup> Again, where the claim must set out "the amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished," a claim for materials furnished and work and labor done must state the amount claimed for each as a distinct item, or the omission will render it totally invalid.<sup>3</sup> So, if it contained no other description than "the sum of one hundred dollars, being a debt contracted for materials (to wit) lumber furnished on the 5th and 6th days of February, 1847," it is insufficient. The amount of the lumber furnished should have been given, or something stated as to quantity.<sup>4</sup> The kind of lumber need not have been mentioned. A description of so many feet of lumber, third common, would have been sufficient.<sup>5</sup> A statement, however, which gives only the information which is afforded upon a *quantum meruit*, would in no case, under such a provision, be sufficient.<sup>6</sup> The requirement that the affidavit state "to and for" whom labor or material may have been supplied, and the contract relation of the lien-claimant with such person, held not to have been complied with by a statement that material was furnished "to and for the construction of the St. Paul City Railway," at prices agreed upon between the plaintiff and a designated contractor with the St. Paul City Railway Company, the lien-claimant being a sub-contractor. This does not show to and for whom the material was furnished, with whom the contract was made, except that the price charged was agreed upon between the plaintiff and the construction company. It is not alleged that there was any contract between the plaintiff and the construction company pursuant to which the material was furnished.<sup>7</sup> Materials may be described by abbreviations not understood outside the trade, and the omission of the dollar mark will not destroy the meaning where the prices are given in dollars and cents separated by a line.<sup>8</sup> A sub-contractor may in Minnesota state the labor and material in gross.<sup>9</sup> The fact that the parties have changed an open account into an account stated does not affect

<sup>1</sup> [Hurley v. Lally, 151 Mass. 129.]

<sup>2</sup> Gogin v. Walsh, 124 Mass. 516 ;  
Smith v. Emerson, 126 Mass. 169.

<sup>3</sup> Noll v. Swineford, 6 Penn. St. 187 ;  
Lauman's Appeal, 8 Penn. St. 473.

<sup>4</sup> Heron v. Robinson, 2 Pars. Sel. Cas.  
248.

<sup>5</sup> Ferguson v. Vollum, 1 Phila. 181.

<sup>6</sup> Carson v. White, 6 Gill (Md.), 17.

<sup>7</sup> [Fleming v. St. Paul City Ry. Co.,  
47 Minn. 124, 127.]

<sup>8</sup> [Smith v. Headley, 33 Minn. 384 ;  
Gutzwiller v. Crowe, 32 Minn. 70.]

<sup>9</sup> [Leeds v. Little, 42 Minn. 414 ; King  
v. Smith, Id. 286 ; Johnson v. Stout, Id.  
514.]

the lien.<sup>1</sup> Where the law requires that the statement filed for record shall contain "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, with a statement of the terms, time given, and conditions of his contract," there must be a substantial compliance with all of these requisites, and none are to be treated as unessential. Thus, to say "that the terms, time given, and conditions of said contract are and were cash" was held to be too indefinite.<sup>2</sup> But "cash upon demand in gold coin of the United States" was held sufficient, in a subsequent case, referring to and distinguishing *Hooper v. Flood*.<sup>3</sup> But where "every claim must set forth the nature or kind of work done, or the kind and amount of materials furnished," a claim for a certain number of feet of tin roofing and spouting, at a certain sum per foot, is, in respect to description, a substantial compliance with the above requirements; and a claimant was entitled to compensation for a specific job of work which when done so combined the work and materials as to render it unnecessary, in view of the law, to separate them in the claim.<sup>4</sup> Under a statute requiring "a just and true account of the demand due him" to be filed, a description "Junction City stone furnished for First National Bank building, as per contract, and labor setting same, \$7,790," was held sufficiently specific.<sup>5</sup> In the same court a lien claim for furnishing and laying a given number of bricks is sufficient, though it does not state whether the bricks were computed by actual account, or by wall measurement, and although it does not separate the value of the bricks from that of the sand and lime used in placing them.<sup>6</sup> In case of brick work, an account stating the wall measurement, or brick layers' measurement is sufficient, — they are the same, and are what the statute prescribes.<sup>7</sup> The statement required by the Missouri mechanics' lien law is a fairly itemized account, showing what the materials are, the work that was done, and the price charged. A lumping item of the whole contract price on one hand, and the credits on the other, is no compliance with the law. The account should be complete on its face, and a reference to the plans and specifications is worthless, and adds nothing to the statement.<sup>8</sup> In all mechanics' lien cases the account filed must be so itemized as to

<sup>1</sup> [Dennis v. Smith, 38 Minn. 494,  
496.]

<sup>2</sup> Hooper v. Flood, 54 Cal. 218.

<sup>3</sup> [Blackman v. Marsicano, 61 Cal. 638,  
640.]

<sup>4</sup> Pue v. Hetzell, 16 Md. 539.

<sup>5</sup> Hilliker v. Francisco, 65 Mo. 598.

<sup>6</sup> [McDermott v. Claas, 104 Mo. 14.]

<sup>7</sup> [Doyle v. Wurdeman, 35 Mo. App.  
334, 335.]

<sup>8</sup> [Rude v. Mitchell, 97 Mo. 366.]

enable issue to be taken upon each item, and this whether the owner have knowledge as to the correctness of the account or not.<sup>1</sup> An account in gross for the entire contract price is not sufficient.<sup>2</sup> The words "mill work, \$3,225; carpenter work, \$2,400; brick work, \$4,500," are not such an account as the statute requires as the foundation of a mechanics' lien, whether filed by the sub-contractor against the contractor, or by the contractor against the owner.<sup>3</sup> When the contract for the papering of the walls of a building at a fixed price per roll is made between the owner and the contractor therefor, an account filed as a mechanics' lien for the work will be insufficient if it merely states the aggregate amount due for the work, without showing the number of rolls used and the price per roll.<sup>4</sup> "We have hitherto proceeded upon the idea that, where the original parties to the contract have agreed on a round sum for the price of the building, all that the builder can do in drawing his account is to state such round sum as the first item, though our understanding has been that the rule is different in the case of the lien of a sub-contractor. We have supposed that an attempt on the part of a builder to divide up this round sum arbitrarily, so as to show how much he regards as chargeable to the masonry, how much to the carpenter work, how much to the plastering, and the like, would be nugatory, because neither justified nor authorized by the contract, which has made no such division. But now that the supreme court has decided that this must be done, even as between the original parties to the building contract, it is our duty to conform our judgment to their view of the law. Here the first item of the account is 'To building complete, one two-story house with mock-mansard roof, situated at number 2819 Sheridan Avenue, for contract price, thirty-nine hundred and ninety dollars.' This defect rendered the entire lien void."<sup>5</sup> An account filed for a mechanic's lien, which describes the work done according to the usual mode of describing such work, showing the quantity and measurement of each of its different elements, which is drawn up with sufficient particularity to enable the property owner to ascertain by a re-measurement whether the several items have been done in the quantities charged for, and in which there is neither a mingling together of lienable and non-lienable items, so that they cannot be sepa-

<sup>1</sup> [Heinrich v. Carondelet Gymnastic Society, 8 Mo. App. 588.]

<sup>2</sup> [Bruns v. Capstick, 46 Mo. App. 397.]

<sup>3</sup> [Codling v. Nast, 8 Mo. App. 573.]

<sup>4</sup> [Kern v. Pfaff, 44 Mo. App. 29.]

<sup>5</sup> [Smith v. Haley, 41 Mo. App. 611, 621.]

rated, sufficiently complies with the law.<sup>1</sup> That an itemized account to which no affidavit is attached is filed with the papers, and is attached to the non-itemized account following the affidavit by which the latter is verified, is not a compliance with the lien law.<sup>2</sup> A sub-contractor's account which refers for its items to the contract between the contractor and the sub-contractor is not a sufficient basis for a lien. The amount of the lien charged must certainly and definitely appear from the account filed.<sup>3</sup> A bill of particulars annexed to the claim, and referred to therein, is to be considered as a part of it; and if the dates and items be there specified, it is a substantial compliance with the requirements of the law. All that is required is that enough should appear on the face of the statement to point the way to successful inquiry, which may be done as well by bill of particulars referred to in the claim as by averment therein.<sup>4</sup> A statement of lien for "painting the Sharon Hotel per contract, Oct. 7, 1885, \$240," is sufficient where nothing appears to show that the statement is not itemized as nearly as possible.<sup>5</sup> In an Oregon case the court said, "the statement of Ainslie & Co. was technically untrue. To have been precise, they should have set out the original amount of their claims, given the credit thereon, and have claimed the balance, but the result would have been the same. The discrepancy was so slight that it could not have misled Mrs. Kohn, and cannot in my view be deemed material."<sup>6</sup>

§ 351. **When cured by Verdict, etc.** — A notice which might be considered defective, on objection taken before trial, for not sufficiently setting out the items of labor, will not necessarily be adjudged bad after trial. Thus, where it was necessary to state "the nature and kind of the work done, or the kind and amount of materials furnished," it was held sufficient after verdict, though not a full compliance with the law, if it be for "materials, viz., plastering found and provided in the erection," etc., a bill of which materials was annexed, as follows: "To plastering house, etc., \$51.68."<sup>7</sup> Again, under the same law, the notice contained a statement that the claim was for so many feet

<sup>1</sup> [Kearney v. Wurdeman, 33 Mo. App. 447.]

<sup>2</sup> [Heinrich v. Carondelet Gymnastic Society, 8 Mo. App. 588.]

<sup>3</sup> [Nelson v. Withrow, 14 Mo. App. 270.]

<sup>4</sup> Knabb's Appeal, 10 Penn. St. 186; McLaughlin v. Shaughnessey, 42 Miss. 520; Wilvert v. Sunbury, 81\* Penn. 27.

<sup>5</sup> [Town Co. v. Morris, 39 Kan. 378. See also, School District v. Howell, 44 Kan. 285, 290. (A statement "definite and certain enough for all practical purposes" is sufficient.)]

<sup>6</sup> [Ainslie & Co. v. Kohn, 16 Oreg. 363, 375.]

<sup>7</sup> Shaw v. Barnes, 5 Penn. St. 18.

of lumber, — third common. On motion in arrest of judgment the court is bound to presume that "third common" is a kind of lumber, and that it was so shown to the court and jury upon the trial.<sup>1</sup> So, where "a just and true account of the amount due him under and by virtue of said contract" is to be filed, and the item is, "balance due on settlement," an objection, if taken seasonably, would have required a more particular statement, previous to the hearing before an auditor, but cannot avail on a trial on an agreed statement of facts.<sup>2</sup> So, failure to file a bill of particulars was held to be taken advantage of only by moving to set aside proceedings, or stay them until service be made. Such defect is waived by service of an answer, and cannot be taken advantage of, for the first time, upon the trial.<sup>3</sup> If it can be gathered from the petition, though not explicitly stated, that the dwellings against which the lien was filed constituted one building, erected under one contract, this will be sufficient after verdict.<sup>4</sup>

§ 352. **Items need not be given under Special Contract.**<sup>5</sup> — If there be no special provision of law requiring such items to be given, and the work is done under a special contract for a specified sum, which has been performed, it is not necessary to set forth the items of work and materials in the claim. A mechanic who makes such a contract, and completes it, seldom keeps an account of every portion of the materials he uses or the work he does; nor is there any occasion for it. He is to complete the houses according to his contract, and he is to be paid a stipulated sum. It is of no consequence to the owner or public that he should state the number of cubic yards dug for the cellar, or the number of perches of stone wall built. He states what is equally useful, — his contract and its terms. Nor where there has been a nearly complete performance, — the entire completion of the contract having been dispensed with by the owner.<sup>6</sup> In like manner, although a statute requires "an account in writing of the items of labor" to be filed, yet where a mechanic has undertaken and completed a building as an entire job, by the job, and for an entire price, he need not in an account filed, in order to secure a mechanics' lien, make a detailed statement of his labor and materials. In such case the entire job may be set

<sup>1</sup> *Ferguson v. Vollum*, 1 Phila. 181.

<sup>2</sup> *Busfield v. Wheeler*, 14 Allen (Mass.), 139.

<sup>3</sup> *Norcott v. First Baptist Ch.*, 15 N. Y. Supreme Ct. 639.

<sup>4</sup> [*Peck v. Bridwell*, 10 Mo. App. 524.]

<sup>5</sup> This section was cited with approbation in *Ferguson v. Ashbell*, 53 Tex. 249.

<sup>6</sup> *Young v. Lyman*, 9 Penn. St. 449; *Haines v. Burr*, 1 Phila. 52; *Stiles v. Leamy*, Id. 29.



down as a single item,<sup>1</sup> as it would be very difficult, if not impossible, for the mechanic to furnish a detailed statement of particulars. But if the account had, from the nature of the contract and dealings between the parties, properly consisted of a succession of particulars, forming the subject-matter of a running account, an account simply stating the gross amount for a particular kind of work would hardly be a compliance with the statute.<sup>2</sup> Subsequently, under the last quoted statute, an account stating that the lien was claimed for carpenter's work on house, as measured, at \$951, was held to be sufficiently explicit.<sup>3</sup> An account for painting a house for a lump sum need not be itemized.<sup>4</sup> Describing labor performed as "plans, specifications, and superintending building," is sufficiently specific as to the kind of labor.<sup>5</sup> So, where "every person, etc., shall file in the recorder's office a just and true account of the demand due him, after deducting all proper credits and assets," etc., it is not necessary to give the items of the work and materials, in the statement filed, where the contract for the construction of the building is for a sum in gross.<sup>6</sup> Where an act provides that "the bill of particulars need not state the particulars of the labor or materials, further than by stating generally that certain work therein stated was done by contract at a price mentioned," it was held that certainty to a common intent is all that is required in such a case.<sup>7</sup> But these rulings do not apply when work has been done or materials furnished at the instance of a contractor. A sub-contractor's notice is required by law to state the terms and conditions of the contract.<sup>8</sup> The items are indispensably necessary to enable the owner to investigate the justice of the claim of the sub-contractor, though he may have performed the work under a special contract,<sup>9</sup> for although a contractor may have the right by statute to file a lumping charge of the work done, this does not give a sub-contractor the right to do the same.<sup>10</sup> If the mechanic contracts with the owner or his agent, the kind of work and material need not be set out in the statement, as in the case of a sub-contract.<sup>11</sup>

<sup>1</sup> [Doolittle v. Plentz, 16 Neb. 153; Manly v. Downing, 15 Neb. 637.]

<sup>2</sup> Davis v. Hines, 6 Ohio St. 473.

<sup>3</sup> Thomas v. Huesman, 10 Ohio St. 152.

<sup>4</sup> [Pool v. Wedemeyer, 56 Tex. 287, 298, citing Phil. §§ 350, 352.]

<sup>5</sup> Knight v. Norris, 13 Minn. 473.

<sup>6</sup> Heston v. Martin, 11 Cal. 41.

<sup>7</sup> Williamson v. N. J. S. R. Co., 28 N. J. Eq. 278.

<sup>8</sup> [Gates v. Brown, 1 Wash. 470.]

<sup>9</sup> Russell v. Bell, 44 Penn. St. 47; Lee v. Burke, 66 Penn. St. 336.

<sup>10</sup> Gray v. Dick, 97 Penn. 142; Howell v. Campbell, 12 Phila. 388; Shields v. Garrett, Id. 458.

<sup>11</sup> [Harnish & Keemer v. Herr, 98 Penn. St. 6.]

§ 353. **Items need not be given when not required by Statute.**—If the statute giving the lien do not require the notice to itemize the work or materials, it will not be necessary.<sup>1</sup> For example, where the provision was that there should be filed “a just and true account of the demand due him, after deducting all proper credits and assets,” etc., it did not require the items to be set out; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, would be a compliance.<sup>2</sup> Where there must be “a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner, and also the name of the person by whom he was employed,” etc., it is not essential to the validity of the lien to specify the items of the account. It is sufficient to set forth a statement of the demand showing its nature and character and the amount due or owing thereon.<sup>3</sup> A “true” statement does not have to be an itemized statement.<sup>4</sup> Where “a true statement of the amount due him, with all just credits given,” shall be filed, it is a sufficient compliance if it give the amount due for which the lien is claimed, without stating the items making up such amount.<sup>5</sup> The amount due must be stated by the sub-contractor in his notice, but it need not be itemized.<sup>6</sup> In Maine the law makes no distinction between a contractor and a sub-contractor in this respect.<sup>7</sup> A statement that the amount due according to the contract was \$13,248.94, on which there had been paid \$6,550.02, leaving a balance due of \$6,705.92 and interest thereon, according to a bill rendered and approved by the defendant, is substantially sufficient as to the sum due.<sup>8</sup> Again, under a statute providing that the notice to be filed should state an intention to hold a lien upon the property for the amount due or to become due, “specifically setting forth the amount claimed,” the notice is sufficient if it state the amount to whom, by whom, and for what due, and the premises upon which the lien is contemplated.<sup>9</sup> The notice of lien filed in the recorder’s office need not contain an itemized account. It is sufficient if it shows the amount due.<sup>10</sup> A law required “the claimant to file an account of his claim,”—all

<sup>1</sup> Patrick v. Smith, 120 Mass. 510.

<sup>2</sup> Brennan v. Swasey, 16 Cal. 140 ; Selden v. Meeks, 17 Cal. 128.

<sup>3</sup> Lonkey v. Wells, 16 Nev. 271.

<sup>4</sup> [Ainslie v. Kohn, 16 Oreg. 363.]

<sup>5</sup> Ricker v. Joy, 72 Me. 106.

<sup>6</sup> [Wescott v. Bunker, 83 Me. 499.]

<sup>7</sup> [Id., 504-506, citing Ricker v. Joy, 72 Me. 106 affirmed ; *contra* to Gray v.

Dick, 97 Penn. 142 ; Rude v. Mitchell, 97 Mo. 365, because the Maine statutes, when the sub-contractor does not act with assent of the owner, allow the owner to prevent a sub-contractor’s lien by giving notice that he will not be responsible.]

<sup>8</sup> Reed v. Boyd, 84 Ill. 66.

<sup>9</sup> Simonds v. Buford, 18 Ind. 176.

<sup>10</sup> [Neely v. Searight, 113 Ind. 316.]

that is contemplated by this provision to be stated is the amount claimed; and when a note had been given for it, the filing of the note would comply with the requisition.<sup>1</sup> So, where a notice should set forth "the amount and from whom the same was due," and the account comprehended labor and materials, but the notice which accompanied it only claimed for labor, the claimant was not confined to a right of recovery for the labor alone, as it was considered immaterial about particularizing in what specific manner the demand accrued.<sup>2</sup> But in another case it was held that a law requiring "a true and just account of the amount due after all just credits are given" requires something more than a mere statement of the balance due.<sup>3</sup> In Nebraska an itemized statement is proper, but not imperatively required.<sup>4</sup>

§ 354. **Items in Case of Personal Notice by Sub-contractor, etc.**<sup>5</sup> —The decisions heretofore cited refer principally to notices to be filed in some public office for record. Under some systems, however, the notice of a sub-contractor is to be served directly on the owner. The statutes providing for this mode have not usually required an itemized account. Thus, where a statute enacted that a laborer, material-man, etc., should give "a written notice to the employer of the original contractor of the nature and extent of their claims against the original contractor or his assigns, over and above all payments and offsets for work and labor done," it is not necessary that the notice should set out the particular character of the materials furnished, or that the materials were used in constructing the building, because the statute does not expressly require it, and the nature and extent of the claim may be as well understood without the aid of such details as with it.<sup>6</sup> In another case where a sub-contractor gave notice, it was held that a mere mistake in the use of a word in a claim filed to secure a mechanics' lien, as where the party should have stated by whom he was "employed," and he stated by whom he was "occupied," did not vitiate the notice, and the court will insert the word intended to be used.<sup>7</sup> Under a provision that "any sub-contractor, journeyman, or laborer, who may be employed in the construction or repairing of any building, or in furnishing any materials for the same, may give to the owner of the building on which he may have worked, notice in writing, particularly setting forth the amount of his claim and the service

<sup>1</sup> Trustees of Caldwell Inst. v. Young, 2 Duv. (Ky.) 582.

<sup>2</sup> Laswell v. Presbyterian Church, 46 Mo. 279.

<sup>3</sup> Graves v. Pierce, 53 Mo. 428.

<sup>4</sup> [Knutzen v. Hanson, 28 Neb. 595.]

<sup>5</sup> See § 296.

<sup>6</sup> Davis v. Livingston, 29 Cal. 283.

<sup>7</sup> McDonald v. Backus, 45 Cal. 262.

rendered for which his employer is indebted to him, and that he holds said owner responsible for the same," etc.; the notice of a sub-contractor to the owner of the building must show that the work was done or the materials furnished for a contractor with the owner, and the amount due, but the items of work or material used need not be stated.<sup>1</sup> So, where a bill of particulars is provided for, but nothing is said as to what it shall contain, a bill setting out that the claim is "for work done and performed, and materials furnished, in flagging, etc., in and about the building described in the notice to him," is sufficient. It was also held that, if it was not as specific or particular as it should have been, it was no ground for setting aside the proceeding where the defendant might under a statute require a more particular bill.<sup>2</sup>

§ 355. **Lien not lost by including Erroneous Items.**<sup>3</sup>—In filing an account of particulars, items may be included for which no lien exists. The lien is not thereby usually lost, unless the excessive claim has been made with a fraudulent intent. The California law provides that "any person who shall wilfully give a false notice of his claim to the owner under the provisions of § 1184 shall forfeit his lien," and "any person who shall wilfully include in his claim, filed under § 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien." These provisions are penal in their nature, and are to be strictly construed.<sup>4</sup> But a claim which includes some articles not the subject of lien, will still be good for such articles as are lienable, if the improper inclusion was not wilful.<sup>5</sup> A statute required that the certificate should describe "the premises and the amount claimed as a lien thereon." Fences were included for which no lien was provided; but the notice was held not to be invalid if the claimant honestly supposed he was entitled to a lien therefor.<sup>6</sup> Even under a law that "a just and true account of the amount due him under and by virtue of said contract" is to be filed, and the account included the wages of journeymen employed thereon, and a charge for pulling down an old building and digging a cellar for the new one, the old materials of which were to be used in the erection of the new one, it was not invalid, for the

<sup>1</sup> *Gilman v. Gard*, 29 Ind. 291.

<sup>2</sup> *Brown v. Wood*, 2 Hilt. (N. Y.) 579.

<sup>3</sup> [See § 296.]

<sup>4</sup> [*Schallert-Ganahl L. Co. v. Neal*, 91 Cal. 362, 365.]

<sup>6</sup> [*Gordon Hardware Co., v. R. Co.*

86 Cal. 620, 622, citing *Phillips*, § 355; *Cannon v. Williams*, 14 Colo. 22; *McDonald v. The Nimbus*, 137 Mass. 360.]

<sup>5</sup> *Bank of Charleston v. Curtiss*, 18 Conn. 342.

items were due, though not as stated.<sup>1</sup> The preceding statute was found so inconvenient and unjust in its operation, that it was amended by providing that "no inaccuracy" of the account filed "in stating the amount due for labor or materials shall invalidate the proceeding, unless it shall appear that the person filing the certificate has wilfully and knowingly claimed more than is his due." A person "wilfully and knowingly claims more than is due" only when he claims something which he knows not to be due; not when he claims what he honestly, though mistakenly, believes to be due to him. And it is not impossible or unreasonable that a house-carpenter should honestly believe that a fence around a house was so far a part of it as to be included in his lien on the house itself, although the law might limit his lien more strictly.<sup>2</sup> So including in the statement a claim for materials, which it was admitted could not be supported, and a claim for the labor of journeymen, which had not then been adjudged untenable, did not show such a wilful overstatement as would defeat the claim, no suggestion being made that any of the items in the account contained in the statement filed were in any respect false or unjustly exaggerated, and it being conceded that the amount was justly due.<sup>3</sup> Again, where if it does not appear "that the person filing the certificate has wilfully and knowingly claimed more than is his due," an inaccuracy in the statement as to the amount does not invalidate the proceedings.<sup>4</sup> Inadvertently and innocently including items for which no lien exists will not defeat the lien, especially where no one has been injured by the mistake and the erroneous items are easily separable from the rest.<sup>5</sup> But where a non-lien claim was mingled with a lien claim, and there was no way to distinguish the amount of each, there was no lien.<sup>6</sup> If a material-man claims against A. in a lump for materials furnished for two houses, only one of which is owned by A., no personal liability under the lien law can be enforced against A. for any part of the confused claim.<sup>7</sup> When services for which a lien might be claimed are *indistinguishably* mingled in the claim with non-lienable items, there will be no lien.<sup>8</sup> The essence of

<sup>1</sup> Whitford v. Newell, 2 Allen (Mass.), 424.

<sup>2</sup> Hubbard v. Brown, 8 Allen (Mass.), 590; Underwood v. Walcott, 3 Allen (Mass.), 464.

<sup>3</sup> Parker v. Bell, 7 Gray (Mass.), 429.

<sup>4</sup> Smith v. Norris, 120 Mass. 63.

<sup>5</sup> Allen v. Frumet Mining Co., 73 Mo. 688; Nolan v. Lovelock, 1 Mont. 224;

Mason v. Germaine, Id. 263; Black v. Appolonio, Id. 342.

<sup>6</sup> Jones v. Walker, 43 N. Y. Superior Ct. 354.

<sup>7</sup> [Crawford v. Powell, 101 Ind. 421.]

<sup>8</sup> [Kelley v. Kelley, 77 Me. 135, 138, citing Baker v. Fessenden, 71 Me. 293; Jones v. Keen, 115 Mass. 185; see also Murphy v. Murphy, 22 Mo. App. 18.]

the matter is that the inclusion of non-lienable items is not fatal if they are separable.<sup>1</sup> The only exception to this is where the account is intended by law, and is in fact notice to the owner of the extent of the lien. Where the contract is for "carpenter work and superintending \$1,900," there can be no lien, although it can be shown how much was due to the carpenter work. The law requires a "just and true account of the demand due him," as a basis of the lien. "The owner of the building has a right to know the amount that is a charge on the property in order that by tendering that amount, he may discharge the incumbrance. . . . It is not sufficient that the amount of the lien can be ascertained by extrinsic evidence; the owner is entitled to be informed of the fact from the account itself."<sup>2</sup> The fact that materials are charged in one continuous account with non-lienable goods sold to the husband does not impair the right to a lien therefor, where the value of the lienable materials can easily be ascertained from the account itself without a re-statement thereof. In such a case in an action against both husband and wife, the plaintiff may have a judgment against the husband for the whole amount of his account, and a further judgment making a portion of that amount a lien upon the land of the wife.<sup>3</sup> Where a claim consists partly of items for which a mechanics' lien exists, and partly not, the case should in a contest for priority of lien be referred to a master to state which are secured by lien.<sup>4</sup> Objections to specific items in a mechanics' lien account on the ground that they are not lienable, cannot be considered under a general objection to the account as a whole.<sup>5</sup> The fatal objection to an improper blending of items in a lien account is not founded on the introduction of some items which are not properly proved, but upon the inseparable blending of items for which no lien is given by law with others that are lienable.<sup>6</sup>

§ 356. **Lien not lost by claiming too great a sum.** — The fact that a greater sum is claimed, in the account filed, to be due than is really owing, does not, in the absence of statutory requirement, vitiate the account where there is no fraudulent misrepresentation, — the greater includes the less. If the account stated be for a less sum than the amount actually due, a

<sup>1</sup> [Dennis v. Smith, 38 Minn. 494 ; Johnson v. Barnes, 23 Mo. App. 546 ; Pullis v. Hoffman, 28 Mo. App. 666 ; McLaughlin v. Schawacker, 31 Mo. App. 365.]

<sup>2</sup> [Nelson v. Withron, 14 Mo. App. 270, 277-279.]

<sup>3</sup> [North v. La Flesh, 73 Wis. 520.]

<sup>4</sup> [Hassall v. Wilcox, 130 U. S. R., 493.]

<sup>5</sup> [Schulenburg & Boeckler Lumber Co. v. Strimple, 33 Mo. App. 154.]

<sup>6</sup> [Id.]

stranger who had acted upon the faith of the statement made in the purchase of the property, and who had paid the purchase-money, except such less sum, might in such case object to paying the excess over the sum so stated.<sup>1</sup> This subject with respect to purchasers and encumbrancers has been in some of the States regulated by statute. But in such cases the statement filed with the clerk is the limit of recovery only with respect to purchasers and encumbrancers where the statute declares that a failure to file the statement shall not defeat the lien except as to the above individuals.<sup>2</sup> In another case where a builder, whose lien was superior to that of a mortgagee, brought an action to enforce his lien, and without any fraudulent purpose included in his judgment a claim for a small amount to which no right of lien attached, it was decided that the error should not be allowed to invalidate the lien, if the builder would pay to the mortgagee the amount thus erroneously included.<sup>3</sup> But where the law required "a certificate containing a just and true account of the demand justly due to him, after all just credits given," to be filed, the omission of a credit dissolved the lien. This provision operated to defeat honest claimants, and was remedied by an enactment providing that "no inaccuracy in stating the amount due for labor shall invalidate the proceeding, unless it appear that the certificate wilfully and knowingly claims more than is due."<sup>4</sup> In California a claim for too much money will not invalidate the lien unless it is wilfully false.<sup>5</sup> A claim for too much material, or at too high a price, but without fraud, will not defeat the lien for the true value of the materials actually furnished.<sup>6</sup> So in Missouri a claim for too much by mistake is not fatal.<sup>7</sup> So in Indiana a mistaken overstatement in the notice not injurious to any one will not defeat the lien.<sup>8</sup> So in Massachusetts, if too large a sum be honestly demanded, the lien will not be thereby defeated,<sup>9</sup> as where the whole amount claimed is really due on the work, and such as a party may reasonably suppose is covered by the lien; so, when a claim is made for materials and labor, when none exists for the latter.<sup>10</sup> So,

<sup>1</sup> Thomas v. Huesman, 10 Ohio St. 152.

<sup>2</sup> Neilson v. Iowa E. R. Co., 51 Iowa, 187.

<sup>3</sup> Cheshire Prov. Inst. v. Stone, 52 N. H. 365.

<sup>4</sup> Lynch v. Cronan, 6 Gray (Mass.), 531; [Sexton v. Weaver, 141 Mass. 273.]

<sup>5</sup> Barber v. Reynolds, 44 Cal. 533; [Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 586.]

<sup>6</sup> [Harmon v. S. F. & C. R. Co., 86 Cal.

617; Nichols v. Culver, 51 Conn. 177, 180, citing Phillips, § 356; Boyce v. Poore, 84 Ga. 574, 576.]

<sup>7</sup> [Greenwood v. Harris, 8 Mo. App. 603.]

<sup>8</sup> [Albrecht v. The C. C. F. L. Co., 126 Ind. 318, citing Kiel v. Carll, 51 Conn. 440.]

<sup>9</sup> Busfield v. Wheeler, 14 Allen (Mass.), 139.

<sup>10</sup> Whitney v. Joslin, 108 Mass. 103.

where the certificate of lien shall state the amount of the debt, "as nearly as the same can be ascertained," a mechanic's account was \$1,162, for which he took notes, including interest, amounting to \$1,187, and this amount, acting in good faith and intending to comply with the statute, he stated in his certificate as the amount due him, the lien was not invalidated by the inaccuracy.<sup>1</sup> Again, where a claim was filed for \$4,270, when the amount actually due was only \$1,544, but the error was accounted for by including certain notes and omitting certain credits, and there was no intention to mislead, it was held the lien was good for the amount actually due, against a mortgagee who had taken his mortgage while the work was being done, and before the certificate of lien had been filed.<sup>2</sup> But under a similar statute, as where "a just and true account of the demand due, after all just credits have been given," is to be filed, it has been held that an omission to give credit for payments made will entirely invalidate the lien. It may be of great and essential moment to the owner of the property, it was said, to know the exact amount for which it is encumbered. The mechanic or material-man who claims the lien may omit to give the proper credit, as well for a large as a small amount. The party owning the property may be desirous of selling. A purchaser might be found perfectly willing to buy with a certain amount existing against it as a lien, but not if it be encumbered greatly in excess of that amount. Protracted litigation may ensue on an attempt to prosecute the lien to final judgment, and the owner be deprived of the market value of his property for an indefinite period, on account of the failure to comply with the statute in giving the just credits. Where the statute mentions several things to be stated, the court has no right to dispense with one more than another. But if a statute should not require the credits to be given, then an error or overcharge will not necessarily defeat the lien. Even under a statute as above, a mistake in the price of labor, or in the value charged for materials, about which there might be a difference of opinion, would not defeat the lien.<sup>3</sup> In New Jersey the whole claim is impaired by claiming more

<sup>1</sup> *Hopkins v. Forrester*, 39 Conn. 351.

<sup>2</sup> *Marston v. Kenyon*, 44 Conn. 349.

<sup>3</sup> *Hoffman v. Walton*, 36 Mo. 613. The above is at variance with a previous decision of the same court, which held under the same statute, that the lien was not avoided or divested by reason of the sum claimed being excessive, whether the excess be great or small, or whether the claim be made with knowledge or in

ignorance of the true amount. If the legislature had intended, it was said, that the right of the lien-holder should depend upon the question of his good faith in the statement of his demand, such intention would not have been left to mere construction, but would have been expressed in plain words. *Heamann v. Porter*, 35 Mo. 137.



than is due, or inserting items for work not lienable. . . . "A privilege to make exorbitant and ill-founded claims, and on a refusal of payment to intercept such sums and hold them in the hands of the owner an indefinite time, would be simply an instrument of vexation and oppression. The statute says the workman or material-man shall give notice of the contractor's refusal to make payment, and of the amount due to him or them, and so demanded; and it proceeds to authorize the owner thereupon to retain the amount so due and claimed. Obviously, then, the amount demanded must be the amount due. As the amount claimed is to be retained by the owner, it would be a sheer injustice to allow more to be claimed than is justly due."<sup>1</sup> In Iowa a demurrer will lie against a statement blending the true lien account with other matters, and claiming for a general balance larger than that for which a lien is due. Such a statement is not the "just and true account" required by statute.<sup>2</sup>

§ 357. **When "a Just and True Account" is to be filed.** — The character of the account to be filed with or incorporated in the notice or claim, as regards the amount due, must also be framed with special reference to the terms of the law. A "just and true account" is one which contains the various items and dates which go to make it up, so that it may be seen on its face that everything it includes is lienable.<sup>3</sup> But the account required by the statute is not necessarily invalidated as a lien because it fails to give the dates when the work was done, provided it appears from it, or other parts of the lien paper filed, that it was completed, and the indebtedness accrued within the period required by the statute to entitle the contractor or sub-contractor to a lien.<sup>4</sup> The failure of the account to state the date of the doing of the work will not vitiate the lien, if the affidavit attached thereto shows that the lien was filed within the requisite time.<sup>5</sup> Where the contract was for the performance of labor on the defendant's building at so much per hour, an account filed with the lien claim, which shows the number and dates of the hours worked, without describing the particular kind of work done, is sufficient.<sup>6</sup> A mechanics' lien account which contains a debit and a credit for the same item does not therefor fail of being

<sup>1</sup> [McPherson v. Walton, 42 N. J. E. 282, 285, 286; Reeve v. Elmendorf, 9 Vr. 125.]

<sup>2</sup> [Stubbs v. Clarinda, &c. R. Co., 65 Iowa, 513.]

<sup>3</sup> [Curless & Co. v. Lewis, 46 Mo. App. 278, 281.]

<sup>4</sup> [Hayden v. Wulffing, 19 Mo. App. 353, 358.]

<sup>5</sup> [Kern v. Pfaff, 44 Mo. App. 29.]

<sup>6</sup> [Steininger v. Raeman, 28 Mo. App. 594.]

a just and true account, when the evidence shows that the item might, without affecting the rights of either party, have been left out of account altogether.<sup>1</sup> As where it is required that the claimants should give "a written notice to the employer of the original contractor of the nature and extent of their claims against the original contractor or his assigns, over and above all payments and offsets for work and labor done or agreed to be done or materials furnished," etc., it is imperative that the notice should contain a statement that the amount for which the lien is claimed is due "over and above all payments and offsets," otherwise it is fatally defective.<sup>2</sup> An expression of "payments and offsets" is substantially equivalent to "credits and offsets."<sup>3</sup> The fact that the claim should contain "a statement of a just and true account of the amount due" does not render it necessary to aver that the account therein set forth is "a statement of a just and true account of the amount due."<sup>4</sup> So, if it be necessary to file a "just and true account of the demand due, after all just credits had been given," the term "account," as thus used, is a detailed statement of mutual demands in the matter of debit and credit arising out of a contract, or some fiduciary relation between the parties; and a statement filed under the above law, which does not show even the aggregate of the different items, or the aggregate of the credits on account of the work, but simply sets down, in a round sum, what the plaintiff claims as the balance due him, is insufficient. When it is proposed, it was said, to embarrass real estate with the encumbrance of a lien, it is no hardship to require of the lienors a statement of their demand, sufficiently precise and full to acquaint the owners and all parties interested in its nature and extent, with a specification of debt and credit. This was clearly the intent of this law, and the provision is wholesome, and must be respected and carried out.<sup>5</sup> And where a statement of "a just and true account of the amount due, with all just credits given," shall be filed, but "no inaccuracy in stating the amount due for labor shall invalidate the proceedings, unless it shall appear that the filing the certificate has wilfully and knowingly claimed more than is due," a certificate filed, claiming a lien for the entire amount agreed to be paid for the performance of a contract to do certain labor in the erection of a building, and

<sup>1</sup> [McLaughlin v. Schawacker, 31 Mo. App. 365.]

<sup>2</sup> Davis v. Livingston, 29 Cal. 283.

<sup>3</sup> Preston v. Sonora Lodge, 39 Cal. 116.

<sup>4</sup> Gilbert v. Fowler, 116 Mass. 375.

<sup>5</sup> McWilliams v. Allan, 45 Mo. 573; Graves v. Pierce, 53 Mo. 428.

stating that the mechanic has not completed the work, by reason of proceedings in insolvency against the owner of the land, and not stating the proportion due for the labor actually performed, is insufficient.<sup>1</sup> But where "an account" has to be filed, and a detailed statement of the materials furnished was filed, with a statement that they were furnished in pursuance of an annexed written contract, of the amounts paid, with dates and the amount claimed to be due, it was sufficient.<sup>2</sup> So, where notice of lien filed by a sub-contractor, stating that "the bill hereto annexed contains a correct statement of the work done and the moneys paid and the balance due," and having such bill annexed, fulfils the statutory requirement, that the notice should state that the amount demanded is one existing after deducting all just credits and offsets.<sup>3</sup> Again, where "a true statement of the amount due, with all just credits given" shall be filed, it is a sufficient compliance if it give the amount due for which the lien is claimed, without stating the items making up such amount.<sup>4</sup>

§ 358. **Must appear that Work was done for the Building.**<sup>5</sup> — Where the law required a statement that "the materials were purchased to be used in the construction of the building," and the lien notice stated that the claimants were to furnish doors for the house, this was held a sufficient compliance.<sup>6</sup> So, where the claim must set forth "the nature of the work or materials," it should be so done with such a specification of the building as would exclude work done or materials furnished for anything else. A claim, therefore, for work and labor done on a house "for or about the erection and construction of the said building and appurtenances," is not sufficiently certain. An appurtenance may be a yard, an alley, a cistern, an ice-house, etc., distinct from the principal building, and consequently not within the purview of the lien laws. It is incumbent on the material-man or mechanic to bring himself within the statute, and to show title affirmatively on the face of the proceedings, and not for antagonistic creditors to show the reverse.<sup>7</sup> But if, in the claim filed, a sum be claimed as a balance of "the contract price for the erection and construction of the building and the materials furnished for the same," it would be sufficient to control the subsequent repugnant allegation in printed letters, that the work, etc., was done "for and about the erection and construc-

<sup>1</sup> *Lewin v. Whittenton Mills*, 13 Gray (Mass.), 100.

<sup>2</sup> *Atkins v. Little*, 17 Minn. 353.

<sup>3</sup> *Smith v. Baily*, 8 Daly (N. Y.), 128.

<sup>4</sup> *Ricker v. Joy*, 72 Me. 106.

<sup>5</sup> [See § 342.]

<sup>6</sup> *Smith v. Baily*, 8 Daly (N. Y.), 128.

<sup>7</sup> *Barclay's Appeal*, 13 Penn. 495.

tion of the building and appurtenances.”<sup>1</sup> So, where the lien is given only for “the erection and construction of a building” unless with the written consent of the owner, and the claimant added “alteration and repairing of and improvement,” it was held, where the facts justified it, that these last words might be rejected as surplusage.<sup>2</sup> Where the rights of lien for construction and reparation are different in their effect, the claim should distinguish the amount of each.<sup>3</sup> It is not necessary that the account for materials furnished for the erection of a house should contain the very words of the statute, as furnished “for or about the erection or construction of the same;” any equivalent words are sufficient.<sup>4</sup> Where a party had a lien upon the land and house, and he claimed it only against the building, which was contemplated in some cases by statute, it was held that the greater included the less, and the claim was good.<sup>5</sup> In an action to enforce a laborer’s lien, the complaint should disclose the property and the nature of the estate held by the defendant, and upon which the lien is claimed.<sup>6</sup>

§ 359. **Time when Work was done.**<sup>7</sup> — Where the claim must state “the time when the materials were furnished or the work was done,” this requirement must be complied with, otherwise the claim will be defective. It is essential to the owner of the building, the purchaser, and other lien creditors, to enable them to trace out the truth of the claim and guard against error or imposition.<sup>8</sup> The precise day, however, when the work was done or the materials furnished need not be stated in the claim, but there must be stated upon its face, or by reference to some accompanying paper, a date or dates which will show that the work was done or the materials furnished within the period allowed, and evidence must be given on the trial establishing this fact. Where the work was done or the materials furnished under an entire contract, the different times when the work was performed or the materials delivered need not be stated. One date is sufficient; and the claim will be good if the evidence proves that the completion of the contract was within the statutory limitation from the time when the claim was filed, although the day stated in the claim as the time of the consummation of the contract may not correspond precisely with the one, estab-

<sup>1</sup> *Singerly v. Cawley*, 26 Penn. 248.

<sup>2</sup> *Fisher v. Rush*, 71 Penn. 40.

<sup>3</sup> *James v. Van Horn*, 39 N. J. L. 353.

<sup>4</sup> *Kelly v. Brown*, 20 Penn. 446.

<sup>5</sup> *Gaskill v. Davis*, 53 Ga. 645.

<sup>6</sup> *Dano v. M. O. & R. R. Co.*, 27 Ark. 564.

<sup>7</sup> [See § 357.]

<sup>8</sup> *Witman v. Walker*, 9 Watts & S. 183.

lished by the evidence.<sup>1</sup> In another case, however, in the same State, the bill of particulars stated that the work or materials were done or furnished on one day of the month, it was held to be fatal to recovery if the testimony showed that the work was performed or the materials furnished at another day of the month.<sup>2</sup> On appeal, the court said that where a jury find certain items of materials for a building were furnished under one entire contract, the lower court may permit the plaintiff to deduct from the verdict the amount of certain items whose dates in the claim do not correspond with their dates in his books of original entries.<sup>3</sup> If the times when the work was done or materials furnished can be deduced from the claim and bill of particulars as filed, looking at them together, it is sufficient.<sup>4</sup> But, in another State where the law required the time when the work is done or materials furnished to be stated in the lien, but by accident or mistake, and without fraud, the date was erroneously entered and the proof established the doing of the work or the actual delivery of the materials which are charged, and supplies the correct date, which is within the time allowing the lien to be filed, it was held the error cannot be availed of to defeat recovery.<sup>5</sup> The lien papers must always show that the indebtedness accrued within the time prescribed by the statute for filing of the lien.<sup>6</sup> A sub-contractor's statement must show that some part of the work was done within six months of filing the statement.<sup>7</sup> The exact day need not be stated, but it must appear upon its face that the statement was filed in time.<sup>8</sup> A notice stating that sixty days had not elapsed since materials were furnished, and dated "Nov. 22, 1882," and signed, is sufficient under the statute requiring the notice to state "the date from which he claims it (the lien) to have commenced." "It is equivalent to an assertion that the lien is claimed to have commenced when the materials were furnished. The objection is too technical for the mouth of the owner, the contractor, or his assignee."<sup>9</sup> In Iowa the mere statement that a certain sum is due is not sufficient. The statute requires a statement of the time when the material was furnished, and when the contract was completed, and also the account on which the demand is based.<sup>10</sup> As against the owner, however, the statement need not

<sup>1</sup> Fourth Baptist Church of Philadelphia v. Trout, 28 Penn. 153.

<sup>2</sup> Milligan v. Hill, 4 Phila. 52.

<sup>3</sup> Hill v. Milligan, 38 Penn. 237.

<sup>4</sup> Roche v. Young, 12 Phila. 216.

<sup>5</sup> Treusch v. Shryock, 55 Md. 330.

<sup>6</sup> [Sanderson v. Fleming, 37 Mo. App. 595.]

<sup>7</sup> [Knauff v. Miller, 45 Minn. 61.]

<sup>8</sup> [Id. 64; Johnson v. Stout, 42 Minn. 514.]

<sup>9</sup> [Ryan v. Klock, 36 Hun, 104.]

<sup>10</sup> [Valentine v. Rawson, 57 Iowa, 179.]

show the separate times when the several items of service were rendered. The outside dates are sufficient.<sup>1</sup> Similarly in Massachusetts it is held unnecessary to state the specific days on which work was done, — it is sufficient to state the total number of days' work between two dates named.<sup>2</sup> But in North Carolina it is essential to the validity of a laborer's lien, that the "claim," or notice, which he is required to file, shall set forth, in detail, the times when the labor was performed, its character, the amount due therefor, and upon what property it was employed; and if it is for materials furnished, the same particularity is required. Defects in these respects will not be cured by alleging the necessary facts in the pleadings in an action brought to enforce the lien.<sup>3</sup> In Texas it is immaterial that the account does not give the date of completing the work.<sup>4</sup>

§ 360. **Certainty as to Time.** — Certainty to a common intent is all that is required in stating a mechanics' claim, and where the law requires "the time when the work was done" to be set forth, a claim which states "that the work and labor was done between the 16th April, 1841, and 29th August, 1841," is sufficient; for although it does not specifically state the days on which the work was done, nor the time when completed, yet, according to a fair and reasonable interpretation of these words, they may mean the work was begun on the 16th April, 1841, and completed on the 29th August, 1841.<sup>5</sup> So, a claim "for painting done in and about the erection of said building, and the necessary materials provided therefor, from 1st April, 1842, to 1st October, 1842, and within six months last past," is sufficient.<sup>6</sup> So, a claim stating the amount for stone-work done and furnished "within the six months last past, between 1st June, 1848, and 1st April, 1849," is sufficiently definite as to time.<sup>7</sup> But in another jurisdiction, where the law required a bill of particulars to be filed, "exhibiting, etc., the times when the same was performed," a statement that it was between two given dates was deemed insufficient.<sup>8</sup>

§ 361. **One Date.** — If there be but one date in the bill, the materials are presumed to have been furnished on that day, unless the contrary appears.<sup>9</sup> An item of claim was set forth thus: "June 30, 1847. To building 13 perches at \$150, \$1,950," — the date was presumed to be the time when the work was com-

<sup>1</sup> [Othmer Bros. v. Clifton, 69 Iowa, 656; Valentine v. Rawson, 57 Iowa, 179.]

<sup>2</sup> [Sexton v. Weaver, 141 Mass. 273.]

<sup>3</sup> [Cook v. Cobb, 101 N. C. 68.]

<sup>4</sup> [Pool v. Wedemeyer, 56 Tex. 287.]

<sup>5</sup> Driesbach v. Keller, 2 Penn. 77.

<sup>6</sup> Richabaugh v. Dugan, 7 Penn. 394.

<sup>7</sup> Bayer v. Reeside, 14 Penn. 167.

<sup>8</sup> Associates of Jersey v. Davison, 5 Dutch. (N. J.) 415.

<sup>9</sup> Knabb's Appeal, 10 Penn. 186.

pleted and the quantity ascertained.<sup>1</sup> So a claim filed "for 16,836 bricks furnished within six months last past," annexing a bill of particulars with a single date as the last delivery is sufficient.<sup>2</sup> Where there is but one article, as a chandelier or heater, and an entry on the day the last work is done, though the article required time for its completion, this date is sufficient.<sup>3</sup> But if the year in which the materials were sold and delivered be entirely omitted, it has been held there can be no recovery upon the lien.<sup>4</sup> Or, where the claim stated no time at which the work was done, and where the items charged in the annexed bill had no date but that of the days of the month, the year being omitted. A date at the head of the bill of particulars of September, 1856, was considered as not remedying the defect, as that had to be taken as the date of the bill.<sup>5</sup> Though in a more recent case, a bill of particulars which had June 9 written opposite the items, with the year omitted, was held valid, where the claim referred to it, stating that the items were furnished within six months past.<sup>6</sup> So, where it had to be averred "the time when the materials were furnished, or that they were furnished within six months last past," and a bill of particulars was made a part of the claim, consisting of forty-six items, commencing with "January 17th, 1876," and continuing regularly in chronological order, the last item being under date "October 27th," without specifying the year, it was held sufficient.<sup>7</sup> But the designation of the time when merely the last item of work was done is not sufficient.<sup>8</sup> An impossible date in a bill of particulars, which was apparent on its face, was also considered as no bar to a recovery, on proof to the jury of the real date of furnishing the materials,—it was susceptible of correction.<sup>9</sup> Where the statement of lien filed with the clerk was that the contract was made "on or about the 30th June, 1869," such statement, where no one has been misled by it, will not prevent the party from showing the contract was in fact made about the 22d of said June.<sup>10</sup>

§ 362. **When stated to be within Statutory Limitation.** — Where the claim avers that the work was done within the period allowed for filing the lien, the claim is valid, though the bill of particulars does not show this fact affirmatively. It may be made to appear by evidence that the work was done within the

<sup>1</sup> Donahoe v. Scott, 12 Penn. 45.

<sup>2</sup> Calhoun v. Mahon, 14 Penn. 56.

<sup>3</sup> Young v. Elliott, 2 Phila. 352.

<sup>4</sup> Rehner v. Zeigler, 3 Watts & S. 258.

<sup>5</sup> Reneker v. Hill, 3 Phila. 110.

<sup>6</sup> McClintock v. Rush, 63 Penn. 203.

<sup>7</sup> Scholl v. Gerhab, 93 Penn. 346.

<sup>8</sup> Lynch v. Feigle, 11 Phila. 247.

<sup>9</sup> Hillary v. Pollock, 13 Penn. 186.

<sup>10</sup> Mitchell v. Penfield, 8 Kan. 186.

specified time, which is a question of fact for the jury.<sup>1</sup> A lien claim, dated the 1st and filed on the 3d of November, 1854, alleging that the work was done and the materials furnished "within twelve months last past," and the work when completed was delivered by the contractor to the owner "on the 21st day of September last," sufficiently shows that the lien was filed within six months after the completion of the work.<sup>2</sup> But where the statute requires "the time to be inserted of the furnishing of materials," a statement that it was "filed within six months, according to the act of assembly," is too loose. A lumber-merchant under such circumstances ought to be able to give day and date for every item; and even a mechanic ought to be able to state the commencement and completion of his job with convenient certainty; and where this can be done, it ought to be exacted, as it is a potent guard against imposition.<sup>3</sup>

§ 362 *a*. **Allegation as to Completion of Work.** — Where "laborers' liens shall arise upon completion of their contract of labor," an affidavit to foreclose a laborer's lien must show affirmatively that the contract of labor has been completed.<sup>4</sup> A notice of lien, after setting forth the terms of the contract, that "the materials were to be paid for in cash as delivered," states that "all the work and materials for which said claim is made, has been done," and that the claim is "for work, labor, and materials, done, performed, and furnished," fulfils the statutory requirement that the notice should state whether all the work or materials for which the claim is made has been actually performed, and if not, how much of it.<sup>5</sup> Where the notice stated that the building was completed, but the law only required that the amount the owner had agreed to pay should be due, which was the case, not because the building was completed, for it was not, but because the owner had stopped the work and declared he would not have it completed, — in such case, the statement in the notice as to completion was held unnecessary and immaterial.<sup>6</sup>

§ 363. **Bills of Particulars and Specifications.** — As to how far it is necessary to refer to or file the contract and specifications under which the work was done, it was held, under a law, "when any building shall be erected in whole or in part by contract in writing . . . it shall be liable, provided such contract

<sup>1</sup> McCay's Appeal, 37 Penn. 125; *Ellice v. Paul*, 2 Phila. 102.

<sup>2</sup> *Baker v. Winter*, 15 Md. 1.

<sup>3</sup> *Lehman v. Thomas*, 5 Watts & S. 262; *Faulkner v. Reilly*, 1 Phila. 234.

<sup>4</sup> *McDonald v. Night*, 63 Ga. 161; 61 Ga. 211.

<sup>5</sup> *Smith v. Baily*, 8 Daly (N. Y.), 128.

<sup>6</sup> [*Harmon v. Ashmead*, 68 Cal. 321; see § 323 *a*.]



or a duplicate thereof be filed in the office of the clerk of the county," etc., that one design of requiring the contract to be filed must have been to apprise all mechanics and material-men to what extent the building was exempt from liens, and how far they must look to the responsibility of the builder alone for their remuneration. If the contract simply state that the builder is to do such part of the work and to furnish such portion of the materials as are contained in the specifications, it is obvious that the contract, independent of the specifications, fails to furnish the very information contemplated by the statute. In such case the specifications become an essential part of the contract, not only as between the owner and builder, but also as between the owner and the mechanics and material-men who may have liens upon the building. A contract may, perhaps, be so drawn that the specifications shall form no necessary part of the contract within the purview of the act, in which case they need not be filed.<sup>1</sup> As where the contract provides that all the labor and materials are to be furnished by the builder, then the contract alone will give all the notice required by the statute, and that alone is sufficient to be filed.<sup>2</sup> The necessity of reference to specifications is not increased by reason of an agreement to put in extra work, when it is in the contract and not in the specifications.<sup>3</sup> Where, too, the lien is wholly independent of any special contract for the performance of the work, any reference to a special contract in the claim is unnecessary.<sup>4</sup> All that is necessary in any case to fix the lien is a substantial compliance with the statute. Thus, where the only notice required was the filing of the contract when written, or a bill of particulars when verbal, performance of these acts will secure the mechanic his lien.<sup>5</sup> The burden of showing performance of these acts is on the party seeking to enforce the lien.<sup>6</sup> But if the law provide that "where a claim or lien is filed by a contractor, nothing more shall be necessary than to state in general terms the nature and character of such contract, and the amount due under the same," a lien, as filed, stated the claim to be "for doing all the work and for furnishing all the materials done and used in and about the erection and construction of said tenements," is not a sufficient compliance with the requirement, because the claim

<sup>1</sup> Ayres v. Revere, 1 Dutch. (N. J.) 474.

<sup>2</sup> Babbitt v. Condon, 3 Dutch. (N. J.) 154.

<sup>3</sup> Budd v. Lucky, 4 Dutch. (N. J.) 484.

<sup>4</sup> O'Brien v. Logan, 9 Penn. St. 97.

<sup>5</sup> Ferguson v. Ashbell, 53 Tex. 245.

<sup>6</sup> Lee v. Phelps, 54 Tex. 367; Lee v. O'Brien, Id. 635.

does not state the "nature and character" of any contract, either "in general terms," or any other.<sup>1</sup>

§ 364. **Estoppel by Notice.**—A party is not concluded by everything he may have said or done, even under oath. The doctrine of estoppel is confined within just and rational limits, and a party is not estopped unless he has gained some benefit or advantage by the act which is relied upon as an estoppel, or, unless, by that act, the party claiming the benefit of the estoppel was induced to alter his condition. Therefore, where a plaintiff filed notice of an ineffectual mechanics' lien, wherein he swore that the contract was made with the contractor, in an action against the owner he is not estopped from showing that such contract was in reality made with the defendant as owner.<sup>2</sup> As between the mechanic and owner, the former is not precluded by an account rendered, but not assented to by the latter, from claiming and recovering a larger sum.<sup>3</sup>

§ 365. **By whom to be signed.**<sup>4</sup>—Without signature by the person claiming the lien or his agent, the notice is fatally defective.<sup>5</sup> A claim or notice signed with the name of the claimant by his attorney, as "A. B., by C. D., his attorney," is sufficient.<sup>6</sup> So, a claim required to be signed by a party or his agent, is good if signed by attorneys, when done with the party's authority.<sup>7</sup> Where the statement was not signed, but the affidavit immediately following it was signed, it was held that the failure to sign the statement was unimportant.<sup>8</sup> And although a claim "must be signed" by the mechanic, it is sufficient if he sign his name to the verification.<sup>9</sup> Yet it was held in another case, where a statute required that the account "must be sworn to by the person claiming the lien, or some one in his behalf," the subscribing the affidavit to the account is not the subscribing of the account contemplated by the statute; the account itself must be subscribed.<sup>10</sup> Where there is nothing in the law expressly requiring a notice to be signed, and a mechanics' lien, filed by joint contractors, first gave the several names of the lienors, and afterwards referred to them as "the said A. & Co.," but did not allege that the lienors composed the firm name of A. & C., and the paper was signed by the firm name, — this,

<sup>1</sup> *Baker v. Winter*, 15 Md. 1.

<sup>2</sup> *Smith v. Ferris*, 1 Daly (N. Y.), 18.

<sup>3</sup> *Stryker v. Cassidy*, 76 N. Y. 50.

<sup>4</sup> [Approved in *Shafer v. Archbald*, 116 Ind. 29.]

<sup>5</sup> [*Wetenkamp v. Billigh*, 27 Ill. App. 585. "Want of a date might perhaps be overlooked."]

<sup>6</sup> *Donahoo v. Scott*, 12 Penn. St. 45.

<sup>7</sup> *Treusch v. Shryock*, 51 Md. 163.

<sup>8</sup> [*Deatherage v. Woods*, 37 Kan. 60,

<sup>9</sup> *Hicks v. Murray*, 43 Cal. 515.

<sup>10</sup> *Mayer v. Ruffners*, 8 W. Va. 384; *Stouts' Adm'r v. Golden*, 9 W. Va. 231.

although inartificial, answered the purposes of the statute, and no one could be mistaken as to the claim or the parties asserting it.<sup>1</sup> A statement of the lien of a firm by the firm name need not contain the individual names of the partners.<sup>2</sup> A notice claiming right of lien for a firm, and signed by one of them, is sufficient.<sup>3</sup> The omission of a corporation named Mississippi Planing Mill Company of St. Louis, to sign the words "St. Louis" to the notice to owner, the corporation being rightly described in the body of the notice, is not fatal, as the owners could not be misled thereby. So, where the account filed with the clerk omitted the same words, but the affidavit used the full name, it was held good, for the same reason.<sup>4</sup> But a notice not signed, nor purporting from whom it came, nor who held the claim, is not sufficient. These essential requisites cannot be supplied by evidence of verbal information to the same effect. If this could be done in reference to one particular, it could be done as to all, and the whole would be reduced to a merely verbal notice.<sup>5</sup> So, if a sub-contractor or material-man serves several notices claiming a lien for the same account, they cannot be used conjointly for the purpose of determining the sufficiency of notice to hold a lien. Each must stand on its own merits and be perfect in itself, and the lien will not exist unless some one of the notices is sufficient in itself.<sup>6</sup>

§ 366. **Verification.** — Where a statute declares that the notice to create a lien "shall be verified" before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or of a sufficient verification, is a defect which goes to the whole claim, and cannot be amended.<sup>7</sup> A claim for a mechanics' lien, when filed, should have been verified; and it should appear upon its face to have been verified before it can be made the basis of a proceeding to enforce the claim based upon it.<sup>8</sup> A jurat without seal of the register invalidates the lien.<sup>9</sup> As a rule, this only applies to proceedings subsequent to the statute, for a subsequent amendatory law, requiring the verification of a notice of lien, does not, unless expressly stated, require proceedings instituted prior to

<sup>1</sup> *Miller v. Faulk*, 47 Mo. 262.

<sup>2</sup> [*Lumber Co. v. Osborn*, 40 Kan. 168.]

<sup>3</sup> *White v. Dumpke*, 45 Wis. 454; *Smith v. Johnson*, 2 MacArthur (D. C.), 481.

<sup>4</sup> *Miss. Planing Mill v. Presb. Ch.*, 54 Mo. 520.

<sup>5</sup> *Schulenburg v. Bascom*, 38 Mo. 188.

<sup>6</sup> *Davis v. Livingston*, 29 Cal. 283.

<sup>7</sup> *Hallagan v. Herbert*, 2 Daly (N. Y.), 253.

<sup>8</sup> [*Finane v. Las Vegas Hotel & Imp. Co.*, 3 N. Mex. 256; *Houghton v. Las Vegas Hotel & Imp. Co.*, 3 N. Mex. 260; *Beck Lumber Co. v. Halsey*, 41 Ill. App. 349; *Lindsay v. Huth*, 74 Mich. 712.]

<sup>9</sup> [*Colman v. Goodnow*, 36 Minn. 9.]

the passage of the act to be verified.<sup>1</sup> What constitutes a sufficient verification of the notice or claim has been several times decided. Thus, the signature of a claimant, appended to his statement, and the certificate of the clerk of the court that he made oath to the accompanying affidavit, is a substantial compliance with a statute which demands that the "statement shall be verified by oath," although the claimant fail to sign the affidavit, as the statute only required that the statement shall be verified by oath.<sup>2</sup> So an account made out against a contractor and verified by the claimant's oath is an attested account.<sup>3</sup> Where the "claim must be verified" and recorded with the county recorder, it was held that the recorder might administer the oath.<sup>4</sup> The words, "any person entitled to a lien under this act" may make the affidavit, will not be construed to preclude an agent of the party entitled to the lien from making the oath to the account of items of materials.<sup>5</sup> Where the statute simply requires the filing of a statement "verified by affidavit," a verification by an agent is sufficient.<sup>6</sup> A verification signed by one named in the statement as a partner in the claiming firm is sufficient.<sup>7</sup> An affidavit which sets out that M. is a member of the firm of B. & Co., and their authorized agent to make the affidavit, which is signed "B. & Co., per M.," is M.'s affidavit, and not invalid by the form of signature.<sup>8</sup> So is a verification signed "E. manager, claimant," where the statement designates E. as the claimant's manager.<sup>9</sup> A verification by an employee of the claimant who transacted the business and knew the facts, is sufficient.<sup>10</sup> But if neither the statement nor affidavit is signed by the claimant, or by any one for him, and it cannot be inferred from anything in the said papers that the claim was verified by the claimant or any one for him, the statement is insufficient.<sup>11</sup> A verification signed "B. per G., claimant" is insufficient.<sup>12</sup> Where it appears from the record proper (in this case the petition) that the party who made the affidavit to the lien is the agent of the lienor, it is proper to admit said lien in evidence, although the agency of the affiant does not appear upon the face

<sup>1</sup> *Foley v. Gough*, 4 E. D. Smith, 724.

<sup>2</sup> *Laswell v. Presbyterian Ch.*, 46 Mo. 279.

<sup>3</sup> *Donaldson v. Wood*, 22 Wend. 395.

<sup>4</sup> *Arrington v. Wittenberg*, 12 Nev. 101.

<sup>5</sup> *Williams v. Webb*, 2 Disney (Ohio), 430.

<sup>6</sup> *Delahay v. Goldie*, 17 Kan. 264.

<sup>7</sup> [*Town Co. v. Morris*, 39 Kan. 377; *Deatherage v. Woods*, 37 Kan. 60, 63,

signed expressly "for D. & E. claimant;," *Cunningham v. Barr*, 45 Kan. 158.]

<sup>8</sup> [*Bennett & Co. v. Gray*, 82 Ga. 592, 595.]

<sup>9</sup> [*Lumber Co. v. Osborn*, 40 Kan. 169.]

<sup>10</sup> [*Hug v. Hintrager*, 80 Iowa, 359.]

<sup>11</sup> [*Hentig v. Sperry*, 38 Kan. 459.]

<sup>12</sup> [*Newman v. Brown*, 27 Kan. 117, 121.]

of said lien.<sup>1</sup> A law requiring the lien statement to be verified by oath of the claimant does not require him to sign it.<sup>2</sup> If the verification is substantially clear, it will not be deemed defective because the name of the person sworn appears only in the signature to the oath, and not in the body of it.<sup>3</sup>

§ 366 *a*. **Form of Verification.** — The allegations of the verification depend upon the requirements of the lien law. If any special form is prescribed, it must be followed. If none, then the verification should be in substance what is usual in other legal proceedings. If the law merely provides that the claim is to be verified by oath, without specifying the form, an affidavit that the claim "is true" is sufficient. "The omission to state 'of his own knowledge,' is not a defect."<sup>4</sup> The verification need not set out the particulars of the claim; it is sufficient if it states that the claim is true.<sup>5</sup> A law provided that the bill of particulars should be sworn to, and the claim, which was sworn to, was very full, and referred to the bill of particulars as correct, which was annexed; this was considered a substantial compliance.<sup>6</sup> An oath that the plaintiff in his belief had a lien for the amount of his claim, is sufficient where the statute requires an oath of his belief that he has a lien for the whole or a part thereof.<sup>7</sup> Where the bill of particulars may be "verified by the oath of the claimant or his attorney, to the effect that the same is true," the fact that the attorney may make it shows that it is not necessary to require a verification in the form of a positive allegation that the bill was true. It is sufficient that it be sworn by the claimant to be "in all respects true to the best of his knowledge and belief."<sup>8</sup> Unless the statute requires the statement to "be verified by the oath of the claimant, or some other person having knowledge of the facts," then a verification by an officer of the claimant corporation that "the foregoing statement is true as to the best of the affiant's knowledge and belief" does not fulfil the law.<sup>9</sup> But where the law requires the notice shall be verified in the same manner as a pleading, an affidavit that the statement of the balance is due is not a verification of all the facts stated in the notice, and is not sufficient.

<sup>1</sup> [Missouri Valley Lumber Co. v. Weber, 43 Mo. App. 179.]

<sup>2</sup> [Ainslie v. Kohn, 16 Oreg. 363.]

<sup>3</sup> [San Diego L. Co. v. Wooldredge, 90 Cal. 574, 580.]

<sup>4</sup> [Arata v. Tellurium G. & S. M. Co., 65 Cal. 340.]

<sup>5</sup> [Reed v. Norton, 90 Cal. 592, 602.]

<sup>6</sup> Whitenack v. Noe, 3 Stockt. Ch. (N. J.) 321.

<sup>7</sup> Dyer v. Brackett, 61 Me. 587.

<sup>8</sup> Grey v. Vorhis, 15 N. Y. Supreme Ct. 612.

<sup>9</sup> [Globe Iron Roofing, &c. Co. v. Thacher, 87 Ala. 458, 465.]

Such a defect invalidates the whole claim. It is not obligatory on the defendant to avail himself of the objection sooner than at the trial.<sup>1</sup> Where the affidavit of the agent of the plaintiff stated that the amount was "owing him," and that "he claims" the lien, it was held that by fair construction of language, the affidavit supported plaintiff's claim for lien.<sup>2</sup> But in another case it was held that where an agent makes the affidavit to a claim for lien, the facts should be sworn to positively; merely stating that they are true "according to the best of his (the agent's) knowledge and belief," is not sufficient. The affidavit might be amended by a new affidavit within the time allowed by law for filing the original claim.<sup>3</sup> A verification that does not certify that the statement of every essential fact is true, is no verification.<sup>4</sup> A verification that "the same is true to the best of my own knowledge" is insufficient under a law requiring a verification true to the knowledge of the person making it.<sup>5</sup> Where the whole statement is made in the form of an affidavit instead of a statement with an affidavit attached, the lien is not therefore defeated. There is no substantial difference.<sup>6</sup> Where it is necessary to file "a just and true account," etc., "which statement shall, in all cases, be verified by the oath of the claimant, or some other person having knowledge of the facts," etc., this verification is an oath or affirmation before an officer having authority by law to administer such, and if made before a notary public, whose powers at common law are confined to commercial instruments, it will not be sufficient, in the absence of statutory authority. Neither will verification before an officer of another State or foreign country be adequate unless authorized by law.<sup>7</sup> A statement sworn to before "T. W. T., clerk Q. S.," with seal stamped "Quarter Sessions Court" in Pennsylvania, is insufficient in another State. A notary's office is recognized, but the courts of Minnesota cannot take judicial notice of the authority of a clerk of the quarter sessions in Pennsylvania, and there is nothing in the affidavit to show the clerk's authority to administer oaths.<sup>8</sup> A lien statement may be sworn to before a

<sup>1</sup> Conklin v. Wood, 3 E. D. Smith, 662.

<sup>2</sup> Lamb v. Hanneman, 40 Iowa, 41.

<sup>3</sup> Dorman v. Crozier, 14 Kan. 227.

<sup>4</sup> [McDonald v. Rosengarten, 134 Ill. 126, 131; 35 Ill. App. 71; (statement of times not verified), citing Phillips, § 366; Kelber v. Hanlihan, 32 Minn. 486; see also, Beck Lumber Co. v. Halsey, 41 Ill. App. 349.]

<sup>5</sup> [Keogh v. Main, 50 N. Y. Super. 183; Childs v. Bostwick, 65 How. Pr. 146.]

<sup>6</sup> [Bethell v. Lumber Co. 39 Kan. 230, 235.]

<sup>7</sup> [Chandler v. Hanna, 73 Ala. 390.]

<sup>8</sup> [Hickey v. Collom, 47 Minn. 565, 568.]

notary in another State, and authentication by his official seal is sufficient.<sup>1</sup> In certifying the verification of a lien notice the notary must impress his official seal thereon, as such notice is not primarily intended for use in court, and is therefore not within the exception provided by § 5, Session Laws, 1889-90, p. 474.<sup>2</sup>

§ 367. **Filing.** — After the notice or claim of lien is prepared, it must be either filed in the proper office or served upon the party to be held responsible, as the law may direct.<sup>3</sup> Filing is indispensable.<sup>4</sup> As to such matters, statutes of this character are strictly construed, and, consequently, notices filed in the wrong office cannot support a lien. Thus, where notices of lien had to be filed with the town clerk, under a law which was in existence at the making of the contract, but subsequently a law was passed amending the prior one and requiring the notice to be filed in the office of the county clerk, notices must be filed in accordance with the amendment after the date of its passage.<sup>5</sup> Where a notice was to be filed, when a party made his contract and began to furnish materials, in a certain public office, but, before the time for filing had expired, the first law was repealed, and another place was provided for filing, it was held that if the notice was filed in conformity to the law existing when it was filed, it was correct.<sup>6</sup> Again, if a notice must be served on a "town clerk of the town where the property is situated," and there is no town clerk, although served on the county clerk it will not suffice.<sup>7</sup> Where a notice was filed in the office of a town clerk, instead of the office of the clerk of the county, which latter place the law specified, the notice was held ineffectual, and no lien was acquired.<sup>8</sup> But the filing by a clerk in the store of the town clerk, in charge of the town clerk's office, in the absence of that officer, was held to be sufficient.<sup>9</sup> A notice delivered to the clerk at his house, within the time allowed, and the clerk noted thereon the time it was received, although the latter did not take it to his office and record it until after the thirty days had expired, cannot be impeached for the above facts alone.<sup>10</sup> Where persons claiming liens had to give written

<sup>1</sup> [Wood v. St. Paul Ry. Co., 42 Minn. 411; Phelps & B. Windmill Co. v. Shay, 32 Neb. 19, 22.]

<sup>2</sup> [Gates v. Brown, 1 Wash. 470.]

<sup>3</sup> Walker v. Hauss Hijo, 1 Cal. 183.

<sup>4</sup> [Kruse v. Thompson, 26 Minn. 424.]

<sup>5</sup> Moore v. Mausert, 5 Lans. (N. Y.) 173.

<sup>6</sup> Chadbourn v. Williams, 71 N. C. 448.

<sup>7</sup> Rafter v. Sullivan, 13 Abb. Pr. (N. Y.) 262.

<sup>8</sup> Whipple v. Christian, 80 N. Y. 523.

<sup>9</sup> Dodge v. Potter, 18 Barb. (N. Y.) 193.

<sup>10</sup> Wood v. Simons, 110 Mass. 116.

notice to the owner within sixty days after the commencement of the furnishing materials, and to file a certificate within sixty days after its completion, it was held, where the delivery was complete within the sixty days, the notice to the owner and certificate filed with the clerk could be made at the same time, and it made no difference that the certificate was filed before the notice was given.<sup>1</sup> One repairing a vessel at the master's order in a home port must file his statement or he loses his lien.<sup>2</sup> The Iowa law provides that as against existing incumbrancers no statement need be filed, wherefore they cannot complain of defects in the statement.<sup>3</sup> It is not essential that the account prescribed by law should be filed with the county clerk before bringing suit upon it. The lien attaches upon delivery of the material and service of notice of the lien upon the employer. The filing of the account is required to prevent the lien from lapsing.<sup>4</sup> It is immaterial whether the notice of intention to sue for a mechanics' lien be filed simultaneously with the lien account or not, so that it be filed before the commencement of the suit.<sup>5</sup> The lien must be filed in the county where the property to be charged is situated. And if a lien is given on a railroad in its entirety the claim must be filed in every county through which the road passes.<sup>6</sup> But in Indiana a laborer doing work on a railroad is only required to file a notice in the county where he worked. His lien then covers the whole road.<sup>7</sup>

§ 367 *a*. **Service of Notice.** — When the notice is to be served on a party personally, instead of filed for record, the claimant must be careful to comply with the requirement of the statute. The statute itself being in derogation of the common law, those claiming its benefits must bring themselves within its provisions. Thus, where the statute provides for the service of a written notice, it means actual, personal service. One sent by mail is insufficient.<sup>8</sup> So, where "no lien shall be binding upon the owner until he shall have been notified of the filing of such lien with the register of deeds," a failure to prove that this proviso has been complied with is fatal.<sup>9</sup> Where a law required "the plaintiff shall cause a notice to be published at least once a week for three consecutive weeks in some newspaper," a notice to

<sup>1</sup> Shattuck v. Beardsley, 46 Conn. 386.

<sup>2</sup> [Dunham v. Johnson, 135 Mass. 310.]

<sup>3</sup> [Bissell v. Lewis, 56 Iowa, 231, 240.]

<sup>4</sup> [Whittier, Fuller & Co. v. Blakely, 13 Oreg. 546.]

<sup>5</sup> [Schroeder v. Mueller, 33 Mo. App. 28.]

<sup>6</sup> [Boston, &c. Co. v. C. & O. R. Co., 76 Va. 180.]

<sup>7</sup> [Farmers' L. & T. Co. v. Canada, &c. R. Co., 127 Ind. 251, 259.]

<sup>8</sup> Carney v. Tully, 74 Ill. 375.

<sup>9</sup> Roberts v. Miller, 32 Mich. 290.



claimants published three times in three successive weeks in a weekly newspaper, although less than twenty-one days intervened between the date of the first publication and the time other lien claimants were therein notified to appear, was held a sufficient compliance with the statute.<sup>1</sup> After filing his statement of lien, the sub-contractor has a reasonable time (under the code in force in Maryland, in 1885), in which to serve a copy of it on the owner, so that the copy need not necessarily have been furnished within sixty days after completion of the building.<sup>2</sup> The general principle that notice to an agent in relation to the subject-matter embraced within his agency is equivalent to notice to the principal is applicable to this lien; accordingly, where notice is to be given in writing "to the owner or agent," and a husband is the agent of his wife, a notice to the former is a compliance with the statute.<sup>3</sup> If the notice is served on A. as the agent of the owner, the burden is on the plaintiff to prove the agency.<sup>4</sup> The agent must be agent to receive notice, an agency confined to renting offices in the building is not sufficient. The notice must refer to business within the scope of the agent's authority, or it is not notice to the principal.<sup>5</sup> One having authority to approve all bills is the owner's agent to receive the notice of intent to file a lien.<sup>6</sup> Though the ten days' notice of intention to file the lien has been served on the land-owner's agent, as owner instead of as agent, such service is sufficient to fulfil the object of the statute.<sup>7</sup> Notice by a sub-contractor, where the owner is a corporation, may be served on the agent or officer of the corporation who is duly authorized to enter into the contract under which the job is done.<sup>8</sup> Under a railroad lien law requiring notice to be served on the "secretary or other officer or agent of the company," a service on a director is sufficient.<sup>9</sup> Occasionally difficulty arises from a change of ownership during the progress of the building, as to who is the party in fact described by statute. Thus, under a clause which directed notice to be given "to the owner of the land," notwithstanding he subsequently mortgaged the estate, he is to be considered as owner, if he be allowed to remain in possession by the mortgagee.<sup>10</sup> Again, where the pro-

<sup>1</sup> Decker v. Myles, 4 Colo. 558.

<sup>2</sup> [Deatherage v. Henderson, 43 Kan. 684.]

<sup>3</sup> Jarden v. Pumphrey, 36 Md. 361.

<sup>4</sup> [Anderson v. Volmer, 83 Mo. 403, 406.]

<sup>5</sup> [Henry v. Bunker, 22 Mo. App. 650.]

<sup>6</sup> [Johnson v. Barnes, 23 Mo. App. 546.]

<sup>7</sup> [Shaw & Co. v. Bryan, 39 Mo. App. 523.]

<sup>8</sup> Dunn v. Rankin, 27 Ohio, 132.

<sup>9</sup> [Railway Co. v. McCoy, 42 Ohio St., 251, 252.]

<sup>10</sup> Howard v. Robinson, 5 Cush. (Mass.) 119.

vision was that the sub-contractor or material-man should give notice to the owner of his claim, and the lien attached at the time of performing the work or furnishing the materials, the owner, at the time the lien attached, was considered as the person to whom the notice should be given.<sup>1</sup> A notice signed by the claimant or his agent must be served on all owners or their agents ten days before filing the lien.<sup>2</sup> The lien given by the statute to one who furnishes materials for building is not lost by a failure to serve a bill of particulars on the party owing the debt, who leaves the State, and is absent therefrom, before the expiration of the time within which the bill of particulars must be recorded in order to fix the lien, and before the debt falls due.<sup>3</sup> The law relating to liens for new additions to old buildings requires that notice of intent to file a lien should be given the owner or reputed owner at the time of furnishing the materials, even though ordered directly by the owner.<sup>4</sup> So the law relating to liens on leaseholds requires that notice of intent to file a lien shall be given the owner or reputed owner at the time work is begun. A notice after the work is done is too late.<sup>5</sup> Under the New York law giving a lien for service under contract with a city, notice, in case of building a school-house, by contract with the school trustees, is to be given to the clerk of the board of education, and to the city comptroller.<sup>6</sup> But notice to any city officer is sufficient if it actually comes to the knowledge of those charged with payment, before they have made payment in accordance with the contract.<sup>7</sup> A notice of claim which is filed with the head of the board of education, or of the school trustees of a ward, is a compliance with the requirement that it be filed with "the head of the department or bureau having the work in charge."<sup>8</sup>

§ 368. **Recording.**<sup>9</sup>—As to recording of the notice, the particular statute must again be consulted and complied with. Thus, where "the recorder shall record the notice, when presented, in a book to be kept for that purpose," if the notice be recorded in the "mortgage record," it is a nullity.<sup>10</sup> In Texas the statute which requires the registry of the bill of particulars

<sup>1</sup> *Kuhleman v. Schuler*, 35 Mo. 142; [*Koenig v. Boehme*, 14 Mo. App. 593.]

<sup>2</sup> [*Towner v. Remick*, 19 Mo. App. 205; citing *Schulenberg v. Bascom*, 38 Mo. 189.]

<sup>3</sup> [*Read v. Gillespie*, 64 Tex. 42.]

<sup>4</sup> [*Greezinger v. Ostheim*, 131 Penn. 604; *Thomas v. Hinkle*, 126 Penn. 478; *Best v. Baumgardner*, 122 Penn. 17.]

<sup>5</sup> [*Strawick v. Munhall*, 139 Penn. 163.]

<sup>6</sup> [*Bell v. Mayor, &c.*, 105 N. Y. 139.]

<sup>7</sup> [*Mech. & Tr. Nat. Bk. v. Winant*, 123 N. Y. 265.]

<sup>8</sup> [*Bell v. Vanderbilt*, 67 How. Pr. 332.]

<sup>9</sup> See sections 268, 297, 336.

<sup>10</sup> *Falkner v. Colshear*, 39 Ind. 201.

of work and labor performed by a mechanic, to fix a mechanics' lien, does not require that the record shall be made in a book kept exclusively for that purpose. The lien is fixed if properly recorded in a book in which also mortgages are recorded. The statute requires that liens shall be recorded separate from absolute conveyances, but it does not follow that liens of different characters shall be recorded separate from each other.<sup>1</sup> So the fact that the registration of a contract or bill of particulars, with the accompanying statement necessary to fix a mechanics' lien, is made in a book also used by the clerk to record bills of sale, will not affect the validity of the record, if the book is also used for the purpose of recording all mechanics' liens.<sup>2</sup> The courts will not, however, impose requirements not made necessary by express law. An act required the prothonotary to keep a docket, "in which he shall cause to be entered and recorded all descriptions or designations of lots, and all claims that may be filed, together with the day of filing the same," and he recorded the whole statement except the bill of particulars attached, in the proper docket, with the entry "see bill of particulars filed," and this was considered sufficient.<sup>3</sup> It has been held that a mistake of the officer in recording the name of owner will not prejudice the lien.<sup>4</sup> Failure of the registrar to record the account and affidavit will not defeat the lien, but the original account must remain in the office.<sup>5</sup> Failure of the clerk of a court to forward to the Secretary of State a copy of an account filed for a mechanics' lien against a railroad, as required by a statute, will not defeat the lien.<sup>6</sup> In Texas failure to record a bill of particulars as provided in R. S., art. 3166, is a fatal non-compliance with the statute as to the manner of fixing lien for security.<sup>7</sup> But in Tennessee "registration is not requisite to the creation and maturity of the lien as between the owner of the property and the sub-contractor or material-man. As to them due notice to the owner is all that is necessary to fasten the lien upon the property. It is only when a particular lienor seeks to give his lien precedence over the lien of other persons that registration is required. . . . The provision is: (1) That 'every journeyman shall have this lien for his work or mate-

<sup>1</sup> [Quinn & Roach v. Logan, 67 Tex. 600.]

<sup>2</sup> [Lyon & Gribble v. Logan, 68 Tex. 521.]

<sup>3</sup> Sunbury v. Wilvert, 1 Leg. Gaz. (Penn.) 431.

<sup>4</sup> Getchell v. Moran, 124 Mass. 404.

<sup>5</sup> [Smith v. Headley, 33 Minn. 384; citing Gorham v. Summers, 25 Minn. 81.]

<sup>6</sup> St. Louis Bridge Co. v. Memphis R. R., 72 Mo. 664.

<sup>7</sup> [Lyon & Gribble v. Ozee, 66 Tex. 95.]

rial. . . . Provided, a statement of the amount ' due for such work, labor, or materials shall be filed with the county register, who shall note the same for registration, and put it on record in the trust book in his office, and this registration shall be notice to all persons of the existence of such lien." <sup>1</sup> So, where a law provides that any party doing work, etc., "may give to the owner . . . notice in writing, particularly setting forth the amount of his claim, . . . and that he holds said owner responsible for the same," etc., this notice need not be recorded.<sup>2</sup> After record, the statement may be withdrawn from the registry without impairing the lien.<sup>3</sup> A correction of a recorded statement by an agent without authority to do so, does not help the defects. Such a change of public records is unjustifiable and creates no rights.<sup>4</sup>

<sup>1</sup> [Reeves v. Henderson & Co., 90 Tenn. 521, 525, 526.]      Smith v. Headley referred to papers filed and not recorded.]

<sup>2</sup> Gilman v. Gard, 29 Ind. 291.

<sup>4</sup> [Newman v. Brown, 27 Kan. 117,

<sup>3</sup> [Paul v. Nample, 44 Minn. 453, 454; 121.]

## CHAPTER XXXI.

## JOINT AND SEVERAL CLAIMS.

§ 369. **Joint Claim against Several Contiguous Houses under one Contract.**<sup>1</sup>—Frequently a number of buildings are erected by the same contractor under varying circumstances of contract, ownership, and proximity; and it is important to the practitioner to determine correctly whether the claim for labor and materials which have entered into them should be against them all jointly, or against each building separately, for that which has been expended alone upon its erection. It seems clear from the cases, in the absence of special statutory provision, that one claim of lien may be filed against any number of several houses erected together as an entire work, at one time under one contract, and belonging to one individual or class of individuals. Not to allow such a course would have the effect in many cases to defeat all lien; as, for example, whenever a material-man makes an entire contract to furnish the same owner with all the materials necessary to construct two or more houses for a certain sum of money, or at certain rates, or a mechanic agrees for a gross sum of money to do all the work necessary for their construction, neither would have a lien upon the houses separately, or upon any of them, as a security for the payment of his claim. For, having made an express contract, each party must abide by it; and if the material-man or the mechanic in such case bring a suit, it is clear that, having made but one contract under which he was to be paid a gross sum of money upon the delivery of the materials or performance of the work, he can sustain only one action, in which he can obtain but one judgment, and which must be for the whole amount of his claim. He can therefore file but one claim, which must be for the whole amount of it, against all the houses jointly, otherwise his contract would not support or correspond with the claim filed, which would be an insuperable objection to his recovering in a writ of *scire facias* sued out on it, or upon a complaint in those States where the

<sup>1</sup> [See §§ 127, 203, 351.]

*allegata* must agree with the *probata*.<sup>1</sup> Accordingly, materials for thirty-two buildings put up by one owner at one time and on one lot, having been furnished for them all jointly, are protected by one claim.<sup>2</sup> And where eleven buildings are contiguous to each other, and all owned by one person, they may, as against him, be treated as one building.<sup>3</sup> Where a contract was one, and related to a row of several buildings as an entirety, and not to the particular buildings separately, the whole row is one building within the meaning of the law, from having been united by the parties in one contract, as one general piece of work, and a notice against them all as an entirety is good, without specially setting forth the amount claimed upon each building.<sup>4</sup> An entire contract to build several houses for one person and a lump price creates a lien *in solido* on all the houses, though on distinct lots, and in favor of contractors and sub-contractors also if the sub-contract is entire as well as the original contract.<sup>5</sup> So in Maine when labor and materials are furnished for several buildings on the same lot under an entire contract, the service on each building creates a lien on the whole estate, land, and all the buildings.<sup>6</sup> So in Missouri it is unnecessary to file more than one lien for materials or labor furnished to two or more buildings, provided they were erected under one general contract, and stand on contiguous lots; and whether any or all of the buildings lap over is immaterial.<sup>7</sup> So in Iowa a single lien may be filed against several buildings on separate lots owned by the same person to whom materials were furnished under one contract.<sup>8</sup> But it is not meant that in such a case a lien can be established on one building for materials shown to have been used in another, but only that a lien may be established on one building for materials furnished under a contract for two buildings, without showing that the particular materials for which a lien is sought went into the particular building. If they did not, that is matter of defence.<sup>9</sup> A lien account may join two or more liens for the same person against the same person and property.<sup>10</sup> A joint lien may be taken for work done on a dwelling, and out buildings appurtenant to it.<sup>11</sup> Again, where the owner of several lots

<sup>1</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

<sup>2</sup> Taylor v. Montgomery, 20 Penn. St. 443.

<sup>3</sup> Moran v. Chase, 52 N. Y. 346.

<sup>4</sup> Phillips v. Gilbert, 101 U. S. 721.

<sup>5</sup> [Sergeant v. Denby, 87 Va. 206, 208, citing Phil. § 369, & Phillips v. Gilbert, 101 U. S. 721. Lyon & Gribble v. Logan, 68 Tex. 521.]

<sup>6</sup> [Wescott v. Bunker, 83 Me. 499, 507, citing Wall v. Robinson, 115 Mass. 429.]

<sup>7</sup> [Schroeder v. Mueller, 33 Mo. App. 28.]

<sup>8</sup> [Bowman Lumber Co. v. Newton, 72 Iowa, 90.]

<sup>9</sup> [Lewis v. Saylor, 73 Iowa, 504.]

<sup>10</sup> [Benjamin v. Wilson, 34 Minn. 517.]

<sup>11</sup> [Crawford v. Anderson, 129 Ind. 118.]

procures the erection of a block of buildings thereon, all under one roof, it is proper, upon a petition by material-men to decree a lien against the entire block, and not against each house separately.<sup>1</sup> Where materials are furnished for and are used indiscriminately in the erection of several contiguous buildings, they may, for the purposes of the lien, be regarded as one building, and but one notice of lien need be filed covering all.<sup>2</sup> Where a contract is made to furnish materials for "several houses," and the material is charged in one account, the contract is entire, and the lien covers all the houses, though third parties may have acquired title to one of them.<sup>3</sup> In this case there were several houses on lots separated by a street. When materials have been furnished under a single contract for buildings put up on two lots, a single notice may be filed therefor, as it cannot be expected that a material-man should know how much is used on one of them and how much on the other.<sup>4</sup> Where a party purchased two separate parcels of land, divided by a fence, which he removed, and made improvements upon the two parcels as an entirety, materials furnished which went into the construction of buildings upon both lots, under a single contract, covered both pieces of land as a single lien.<sup>5</sup> A solid lien may be maintained for work and materials put into a dwelling, barns, and other out buildings, on the same farm, all forming one homestead.<sup>6</sup> In Connecticut, however, it is held essential to the validity of a single lien on *separate* buildings that they shall be erected for some connected use.<sup>7</sup> And dwellings rented to separate parties in the ordinary way are not the subject of a connected use.<sup>8</sup> Again, when labor is performed under an entire contract, in the erection or repairing of several buildings owned by the same person, and situated on the same lot, a lien attaches upon the whole estate for the whole value of the labor performed, although the contract specifies separate amounts for the work to be done on each house;<sup>9</sup> and although the land was conveyed to the owner in separate lots, and so designated upon a plan, that one parcel was on one street, and the other on another street, being contiguous in the rear, and the buildings were separate, one on each parcel, and after the contract was made the different parcels were conveyed in mortgage to different persons;<sup>10</sup> and

<sup>1</sup> Orr v. N. W. Mut. Life Ins. Co., 86 Ill. 260.

<sup>2</sup> Hall v. Sheehan, 69 N. Y. 618.

<sup>3</sup> [Tenney v. Sly, 54 Ark. 93.]

<sup>4</sup> Chadbourne v. Williams, 71 N. C. 444.

<sup>5</sup> Marston v. Kenyon, 44 Conn. 349.

<sup>6</sup> [Lindsay v. Gunning, 59 Conn. 296.]

<sup>7</sup> [Wilcox v. Woodruff, 61 Conn. 578.]

<sup>8</sup> Id.]

<sup>9</sup> Wall v. Robinson, 115 Mass. 429 ;

Worthley v. Emerson, 116 Mass. 374.

<sup>10</sup> Batchelder v. Rand, 117 Mass. 176 ;

Childs v. Anderson, 128 Mass. 109.

the finding of a judge, who tries the cause without a jury, that the work was done under an entire contract, is final.<sup>1</sup> So a claimant, in pursuance of one contract with the owner or with his contractor, having furnished labor or materials to several buildings standing upon adjacent lots, is not bound to divide his claim into the number of houses built, but may enforce one general lien therefor upon all the buildings and lots; and this, although since the work was commenced the property may have been sold to several parties. In a proper case, the court, if it possess equity powers, may so adjust its judgment as to equalize the burden among the separate owners.<sup>2</sup> This right to file one claim against several buildings has been maintained, although an act declared that "every dwelling-house or other building (using the singular number) shall be subject to the payment of the debts contracted." The objection that a joint lien was against the grammatical construction of the act, it was said, ought not to prevail where it would militate against the meaning and intention of the legislature as collected from the whole of the act, and against that construction which gives to every word, clause, and sentence a pertinent and useful effect, instead of rendering some of them inoperative.<sup>3</sup> So, where the intent of the statute is to give the mechanic a lien upon the building for labor performed either upon it or its appurtenances, and labor is done upon each, it is unnecessary to specify the value of the work or materials expended upon each separately, but the same may be stated in the aggregate, and a lien be enforced for the amount.<sup>4</sup> The lienor, though having a right to a joint claim against dwelling and stable, will not secure a joint lien unless he includes both in his claim. The mere mention of the word "stable" in the caption of the "Bill of Particulars" is insufficient.<sup>5</sup> Where under a contract to furnish bricks for several houses all the bricks furnished within six months had been furnished for and used on house A., which was released from lien, no lien could be maintained on house B., — none for brick furnished house A., for the release discharged all lien for them: none for brick furnished house B., for too long a time had elapsed.<sup>6</sup> But where a contractor who, under one general contract with the owner, had constructed, upon contiguous lots, two

<sup>1</sup> *Turner v. Wentworth*, 119 Mass. 459.

<sup>4</sup> *Carpenter v. Leonard*, 5 Minn. 155.

<sup>2</sup> *Paine v. Bonney*, 6 Abb. Pr. (N. Y.) 101; s. c. 4 E. D. Smith, 734.

<sup>5</sup> [*Bevan v. Thackara*, 143 Penn. 182, 199, 200.]

<sup>8</sup> *Pennock v. Hoover*, 5 Rawle (Penn.), 291.

<sup>6</sup> [*Nickel & W. v. Blanch*, 67 Md. 456, 460.]



separate buildings, each requiring the same amount and character of labor and material after having been paid more than half the contract price, released one of the houses and lots from his lien, under an agreement with the owner that he should retain a lien on the other for the balance due on his contract, it was held that he should file and enforce his lien on the remaining house and lot for the entire balance due him, where there were no third parties, whose interests were prejudicially affected by the release of the other house and lot.<sup>1</sup> Though section 6729 of the Missouri Revised Statutes, 1889, only authorizes a lien upon more than one lot, when the lots are contiguous, and the buildings are erected under one general contract, yet it must be construed with section 6709, and it is only necessary for the lien paper to comply with that section, which requires no statement in the lien account as to the contiguity of the lots, or whether there were one or more contracts. These are matters of pleadings, and need only to be alleged in the petition.<sup>2</sup> Under the present Missouri law (§ 6729), the question of contiguity does not arise when buildings are erected under one general contract. This law was passed to meet the decision of 61 Missouri, 499-512.<sup>3</sup> A statement claiming a lien on two buildings erected on lots 26 and 27, and describing them as having a front of one hundred and twenty feet, "the south line being two hundred and sixty-four feet north of Fountain," sufficiently shows that the lots are contiguous.<sup>4</sup>

§ 369 *a*. **Several Claims against Contiguous Houses under one Contract.** — The lien is not given or regulated by contract, but by statute, which is in derogation of the common law, and must be strictly construed. Accordingly where the statute gives a lien upon lots and the improvements thereon only for the work done and materials furnished towards the improvements of the lots respectively, the lien must be filed against each improvement separately, although the contract was an entirety, and the payments were to be made and credited upon them as a whole.<sup>5</sup> So, where there are a number of lots, each containing a separate building, although the lots are contiguous and in a compact body of land, and without division fences, a single lien filed against all the lots as one parcel of land, for the aggregate value of all the work and materials on the several houses, is invalid. Nor

<sup>1</sup> [Reilly v. Williams, 47 Minn. 590.]

<sup>2</sup> [Twitchell v. Devens, 45 Mo. App.

283.]

<sup>3</sup> [O'Leary v. Roe, 45 Mo. App. 567, 574.]

<sup>4</sup> [Heier v. Meisch, 33 Mo. App. 35.]

<sup>5</sup> Bayard v. McGraw, 1 Bradw. (Ill.) 134.

can it aid the lien that the work was done under one contract, and not under separate contracts for each building.<sup>1</sup> Again, where the law subjects only the building affected by the lien and the land appurtenant thereto, and a lien was filed against two buildings, and the sums due for each were blended together in the *scire facias*, and a lien on each building was claimed for the whole sum, it was held defective, as the defendant could not plead to each separately or the jury find the respective sums due.<sup>2</sup> Moreover, the lienor is not obliged to file a joint lien, even though he may have the right to do so. The rule against dividing a claim is not of universal application, and where no injury can accrue to the debtor, and there can be no second claim for the same demand, it ought not to be applied to defeat a remedy given by statute; as where a single contract for slating two houses was made with L., who owned one of the houses, a lien may be enforced against his house for the labor and materials put into it under the contract, if they can be distinguished.<sup>3</sup> If a sub-contractor does work and furnishes materials under one general contract with the original contractor upon two buildings situated upon contiguous lots, he is not restricted to one lien therefor, but may file a separate lien against each building, the statute (R. S. 1889, sec. 6729), allowing him in such case to file one lien against both buildings, does not render that procedure mandatory.<sup>4</sup> Where materials are furnished to one or more of several buildings upon a large tract of land used together in the general business of a private corporation, a mechanics' lien may be filed against the particular building or buildings only to which the materials were supplied, and the lots and curtilages appurtenant thereto. . . . The learned counsel for the defendant contends that if this property is at all subject to a mechanics' lien, the claim should have been filed against the entire property, and should not have been confined to the particular buildings for which the work and materials were furnished. This, however, is not the view taken of the mechanics' lien law by this court, as will appear by reference to the cases of *Nelson v. Campbell*, 4 Casey, 156, and *Parrish and Hazzards App.*, 2 Norr., 111. Nor do we believe that a lien so general in its character as to embrace many separate buildings and a hundred and thirty acres of ground, could be sustained.

<sup>1</sup> *Fitzgerald v. Thomas*, 61 Mo. 499 ;  
s. c. Id. 512 ; [*Fitzpatrick v. Thomas*, 76  
Mo. 513.]

<sup>2</sup> *Plummer v. Eckenrode*, 50 Md. 225.

<sup>3</sup> [*Hayden v. Logan*, 9 Mo. App. 492,  
494 ; *Hannon v. Gibson*, 14 Mo. App. 33,  
37.]

<sup>4</sup> [*Kick v. Doerste*, 45 Mo. App. 134.]

If it is in fact true, that all this is but the proper curtilage of the buildings against which the lien is filed, then will that lien cover it.<sup>1</sup> The term "lot of land" in the statute does not mean a city lot, but the tract treated by the parties as an entirety. So where an entire contract is made for building several houses on contiguous lots, the lien is upon the whole tract *in solido*, but the lienor may if he chooses file a separate claim against each house if he can distinguish the labor and material that went into each.<sup>2</sup>

§ 370. **Effect of Joint Claim, etc.** — The effect of a joint claim is, that the lien-holder is entitled to be paid out of all or any of the houses. Thus, where a mechanics' lien for materials furnished for the erection of seven houses under an entire contract had been prosecuted to judgment and sale, such lien-holder was entitled to payment of the full amount of his lien from the surplus moneys arising upon the foreclosure and sale of four of the houses under a prior mortgage, and not merely to four sevenths of his claim.<sup>3</sup> And where a mechanic filed four claims, three of which were jointly charged, each on three of the houses, and a fourth on four of the houses, each claim, embracing houses different from those charged in every other, should be separately charged on the proceeds of the houses specified in it, and not the aggregate charged as one entire claim jointly on the thirteen houses embraced in the four several claims.<sup>4</sup>

§ 371. **Inconveniences of Joint Claim.** — It may be claimed that great inconvenience as well as injury would necessarily arise to the owner of houses, who might by a joint claim be precluded from selling any one or more of them, without he could obtain a sum sufficient to discharge the whole amount of the lien. Whereas, if each house or building be made liable only for the proper expense of its construction, the owner may often have it in his power to sell the whole number consecutively for a much larger sum of money than the amount of the liens upon all, or to sell a part for a sum sufficient to discharge the liens upon all, and to retain the residue; but if he be compelled to wait until he can sell at once as much of the property as will be sufficient to satisfy the aggregate amount of the liens, he may not happen to meet with a purchaser who is willing to buy so largely, and, finally, he may have it sold from him, or other-

<sup>1</sup> [Girard Storage Co. v. Southwark Co., 105 Penn. 248, 252.]

<sup>2</sup> [Lax v. Peterson, 42 Minn., 214, citing Phil. c. 17; Glass v. St. Paul, &c. Co., 43 Minn. 228.]

<sup>3</sup> Livingston v. Miller, 16 Abb. Pr. 371.

<sup>4</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

wise be compelled to sell it himself at a great sacrifice. Doubtless such inconvenience may occasionally take place, but the owner of the ground who wishes to have houses or other buildings put upon it has it in his power, if he choose, to guard against such inconvenience in making his contracts for materials and labor to be employed in the construction of his houses. It is only necessary for him to make a separate contract for the building of each house, or to introduce a clause into a contract for the whole, that each house shall be charged for separately, and liable only for the expenses of its construction, and the lien will follow the nature of the contract. But where the owner is induced to avoid this course, because he discovers that he can obtain materials and labor for building his houses at much less price by making an entire contract for the whole than he could by making a contract for each house separately, why shall he not be permitted to judge for himself in this particular, and act accordingly?<sup>1</sup> The argument in favor of separate claims asserts that an insuperable objection to permitting a lien for materials furnished for several buildings to be included in one claim, with no specification of the amount furnished for each, is, that it enables the lien-holder to shift the encumbrance at his pleasure, and to place the bulk of the claim upon any building, to an amount far exceeding the value contributed to such building, in derogation of the rights of other parties. If the property all continued in the hands of the same owner, the practical effect of such practice, though it might prove embarrassing, might not be either unjust or oppressive. But when it is borne in mind that in most cases where there is a contest for priority of encumbrances, the original owner is insolvent or not interested in the result, and that the contest is between the lien-holders themselves, or between them and equally meritorious classes of creditors, it is difficult to see how the practice can be permitted consistently with law or justice.<sup>2</sup>

§ 372. **Apportionment of.**<sup>3</sup> — The history of this branch of the subject in Pennsylvania indicates that some uncertainty existed as to what was the true construction of its statutes.<sup>4</sup> In an early case, it was decided that a joint claim could not be filed against two or more adjoining houses, though owned by the

<sup>1</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

<sup>2</sup> Morris Co. Bank v. Rockaway M. Co., 16 N. J. Eq. 150.

<sup>3</sup> See sections 261-263.

<sup>4</sup> Acts of 1806 and 1808. For history of apportionment of liens among several buildings, Thomas v. James, 7 Watts & S. 382.

same person.<sup>1</sup> This was denied in the authority cited in the preceding section, and it was held that if a lumber-merchant furnished materials for, or a mechanic did work in the construction of, two or more contiguous houses belonging to the same person, under a general request, without any specific contract for each house separately, he might either file his claim for the amount against all the houses jointly, or he might apportion it among them according to the value or price of the materials furnished or the work done to each, and file a separate claim accordingly.<sup>2</sup> An act was then passed, reciting that doubts had arisen as to what was the proper course, enacting "that the person so finding materials for two or more adjoining houses built by the same person, owner of the same, and debtor for the said materials," may "file, with his claim thereof, an apportionment of the amount of the same among the said houses," etc.<sup>3</sup> This enactment left it optional with the claimant to file an apportionment of the materials with his claim. The act of 1836, however, made this apportionment compulsory.<sup>4</sup> Doubts again arose as to whether claim for work could be apportioned, the provisions of the acts of 1831 and 1836 applying only to "a claim for materials," and it was held that they could not.<sup>5</sup> This decision was reversed subsequently by the supreme court of that State, and the acts were held to include a joint apportioned claim for work.<sup>6</sup> To quiet this conflict, a further act was passed, expressly extending the provision to claims for work.<sup>7</sup> But the act of 1836, providing "that when one claim is filed against two or more buildings owned by the same person, the creditor shall designate the amount he claims to be due on each of the buildings," has been construed to apply only to the case of separate and distinct erections, capable of and intended for distinct possession and enjoyment, and does not relate to a claim against a mansion-house, barn, wagon-house, etc., on one farm to which they are all appurtenant. Such buildings are, in every particular, unlike those which, though apparently joined, are in fact completely divided, each of itself constituting an object of distinct proprietorship and encumbrance. The one is aggregate; the other is segregate. The propriety of apportionment among the latter is manifest; its uselessness, as applied to the former, is not less so. For the reasons given, it is apparent that a case like the present was not within the contemplation of the framers

<sup>1</sup> *Atkinson v. Graves*, Wharton's Dig. (5th ed.) pl. 143.

<sup>2</sup> *Pennock v. Hoover*, 5 Rawle (Penn.), 291.

<sup>3</sup> Act of March 30, 1831.

<sup>4</sup> *Goepp v. Gartiser*, 35 Penn. 130.

<sup>5</sup> *M'Namee v. Stoeve*, Wharton's Dig. (5th ed.) 154.

<sup>6</sup> *Donahoo v. Scott*, 12 Penn. 45.

<sup>7</sup> Act of 25th April, 1850.

of the law. Though the language used, taken literally, may include it, yet, being without the circle of the mischief to be cured, it is clearly not embraced by the spirit of the act, and there is no necessity for an apportionment of the claim among the several buildings.<sup>1</sup> An apportioned claim for materials supplied for a large number of houses in different blocks, with no evidence of the materials that went into the house charged, cannot be maintained. In all the cases permitting apportionment the houses are on adjoining lots.<sup>2</sup>

§ 372 *a*. **Instances of Apportionment.** — When several houses and buildings adjoining each other are erected by the same owner, so that it is impossible for the person who has furnished materials for the same to specify, in the claim filed, the particular house for which the several items of his demand were so furnished, the claim may be apportioned against the several houses; when houses are put up in blocks of two each, there should be a lien filed against each block.<sup>3</sup> A tract of land was divided by its owner into ten building lots fronting on a street. On these lots ten houses were built, two houses adjoining each other, making five blocks of two houses, each house having a side yard. Between two of these blocks an additional space of sixty feet was left, intended for a street. Liens were filed against the whole row, which were apportioned among the ten houses. It was objected that the liens could not be so apportioned because of their separation by this sixty feet space. Held, that the rights of the mechanics, with reference to apportionment, were to be determined by the time when the work was commenced, and as the space had not then been dedicated as a public street, the liens were properly apportioned.<sup>4</sup> One apportioned claim can be filed against two blocks of houses fronting on different streets, where the rear ends extend to and are bounded by a three feet wide alley common to both.<sup>5</sup> Where, "in every case in which one claim is filed against two or more buildings owned by the same person, the person filing such claim must at the same time designate the amount due to him on each building," it does not apply to a case where all the work was performed upon one and the same piece of property, although upon different portions of it.<sup>6</sup> In Nebraska the lien will be apportioned among

<sup>1</sup> *Lauman's Appeal*, 8 Penn. 473. *Vide* further, as to construction of act of 1836, *Harper v. Keely*, 17 Penn. 234; *Davis v. Farr*, 13 Penn. St. 167.

<sup>2</sup> [*Schultz v. Asay*, 15 Phil. 268, 271; citing many cases.]

<sup>3</sup> *Boyd v. Mole*, 9 Phila. 118.

<sup>4</sup> *Kline's Appeal*, 93 Penn. 422.

<sup>5</sup> *Allen v. Fitzpatrick*, 9 Phila. 142.

<sup>6</sup> *Dickenson v. Bolyer*, 55 Cal. 285.

the lots according to the value of the service done on each if ascertainable.<sup>1</sup>

§ 373. **When Several Claims must be filed. — Several Owners.** — A joint claim cannot be filed for materials furnished for the erection of several houses owned by different persons, although the houses join each other and are built at the same time. To make several houses subject to a joint lien would be a most intolerable grievance to the owners, because the cost of each might be different; and, with regard to purchasers, the operation of a joint lien would be very injurious, because it would not be known what proportion each house was to bear. It is said to be extremely difficult for a lumber merchant, who has furnished materials for several houses built under the superintendence of one agent, to keep a separate account against each house, yet there is no reason that he should be exempt from trouble at the expense of his neighbor. There is something so unjust in making one man pay for another's house, that nothing less than very clear expressions will warrant it.<sup>2</sup> The course to be adopted is to file separate claims for the proper proportions of materials furnished to each building belonging to different owners. Then the building of one owner is not covered by a lien for materials which he has never received, and each party on the trial can have the proportion claimed from him fairly adjusted.<sup>3</sup> So, where two married women owned two contiguous lots and built one house thereon, but so as to furnish each a homestead upon her own lot, a lien attached to each lot for the amount due by each party, and the value of labor and materials on each separate lot could be shown.<sup>4</sup> Under the Oregon statute liens are specific; they extend to the particular building, structure, or erection where the materials were used or labor performed. Therefore, a party cannot unite in the same claim items for materials used in building a fence, and also for materials used in building or repairing a house, and claim a lien on the fence and house for such materials. The fence and house are separate structures or erections, and the liens claimed must be for the materials used in each respectively.<sup>5</sup> If a contractor confuses separate accounts or their credits he vitiates his liens.<sup>6</sup>

<sup>1</sup> [Doolittle v. Plenz, 16 Neb. 153, 156, 157.]      The Dalles L. & M'fg Co. v. The Wasco M'fg Co., 3 Oreg. 527; Fitzpatrick v.

<sup>2</sup> Gorgas v. Douglas, 6 Serg. & R. 512.

<sup>3</sup> Kerbaugh v. Henderson, 3 Phila. 17; Davis v. Farr, 13 Penn. St. 167.

<sup>4</sup> Edwards v. Edwards, 24 Ohio, 402.

<sup>5</sup> [Kearzee v. Marks, 15 Oreg. 529; 289.]

<sup>6</sup> [Reitz v. Ghio, 47 Mo. App. 287,

§ 374. **Effect of Separate Owners under Joint Contract.** — If the contracts be several as to each estate, it is thus quite clear that a joint lien cannot be sustained. Joint liens cannot be filed where no community of interest exists.<sup>1</sup> It has been contended, under an act which provides, "whenever any building . . . shall be constructed, by contract with or at the request of the owner thereof, it is hereby made liable, and shall stand pledged for all the work done in the construction of such building," etc., that the law designed to give, and does give, security for the contract under which the work is done, and that when the work is done and materials furnished under a joint contract with the owners of two estates, a joint lien may well be created. But the purpose of the act was to give a lien for nothing more than the labor and materials furnished for the estate upon which they were actually bestowed, and of which they became a part, and not for the security for the performance of contracts generally. Under such an act, it is quite immaterial whether the labor and materials be put there by a joint or a several contract; by one in writing, or by parol, express or implied; sufficient is it that they go upon the estate at the request of the owner, and so much as may be furnished on his estate at his request. But work done or materials furnished to the same owner, if put upon one estate, though done or furnished under the same contract, were not intended to be secured by a lien upon another estate. Several proceedings to enforce the several liens may be maintained, though the contract covers work on other estates of the same person, or of other persons; and evidence for the purpose of showing that buildings were erected or repaired under a joint contract with the owners of both lots, with a view of sustaining a joint lien, would be wholly immaterial.<sup>2</sup> So, where a statute gives a lien upon the building upon which the labor is performed, and upon the interest of the owner of the building, it confers no authority to create a lien upon several estates belonging to different owners, for work done under an entire contract, with no stipulation for a separate price from either.<sup>3</sup> So, where materials are furnished to a sub-contractor of several houses owned by different persons, there can be no lien against a particular house, unless the materials were used in the erection of the same.<sup>4</sup> But under another statute, that "any person who shall, by virtue of any contract with the owner thereof, perform any

<sup>1</sup> *Skyrme v. Occidental Mill Co.*, 9 Nev. 219.

<sup>2</sup> *Butler v. Rivers*, 4 R. I. 38.

<sup>3</sup> *Rathbun v. Hayford*, 5 Allen (Mass.), 406.

<sup>4</sup> *Walkenhorst v. Coste*, 33 Mo. 401.



labor . . . in building . . . any house, shall, upon filing a notice, have a lien for the value of such labor and materials upon such house and lot, to the extent of the right, title, and interest at that time existing of such owner," etc.; where two persons made a joint contract with a builder for the erection of two houses, one to be placed on a lot owned in severalty by one defendant, and the other on another lot owned in like manner by the other, they were both jointly liable to a mechanic employed by the contractor. It was said that the fact that the defendants did not jointly own the lots on which the houses were erected was wholly immaterial. They might be regarded as owners in respect of the contract, and the notice to be served by the mechanic, to entitle himself to be paid out of funds due contractor, might be served on either of such joint owners.<sup>1</sup> Where A. and B., owners of adjoining lots, made an entire contract with M. to erect a building covering both lots, A. to pay \$5,000 and B. \$7,000, the court will adopt this rule of apportionment in dividing the lien for labor and materials. The lien is joint in such a case, but the court will apportion it if practicable.<sup>2</sup> A. has a lien on C.'s house for the work done on it, but not for work done on the houses of others, though all the work was done by A. under one contract with the same contractor.<sup>3</sup>

§ 375. **Effect of Separate Contracts.** — Some diversity of opinion exists as to whether the lien claim should be joint or several when the labor or materials have been furnished for the same owner, but under different contracts. The mechanics' lien does not exist by contract but by statute, and no understanding or agreement of the parties will be of any avail, where the requirements of the statute have not been complied with, especially where third persons have acquired an interest and the non-compliance is apparent on the public records. Thus where the statute gave a lien upon each building and lot for materials furnished in the construction of that building only, and materials were furnished, under separate contracts, for two houses that were being constructed by the same builder upon adjoining lots, one being commenced about six weeks before the other, and no separate account was kept of the materials furnished to either house, nor could it be ascertained how much had gone into either, and the party furnishing the materials filed a single lien on the two houses, by a certificate stating the whole amount fur-

<sup>1</sup> *Mandeville v. Reed*, 13 Abb. Pr. (N. Y.) 173.

<sup>2</sup> [*Ballou v. Black*, 17 Neb. 389, 395, 396.]

<sup>3</sup> [*Sexton v. Weaver*, 141 Mass. 273.]

nished for the two, it was held not to be a valid lien.<sup>1</sup> So, where a statute gave a lien "upon a building and the land upon which it is situated, for labor performed upon such building," it did not give a lien upon one building for labor performed upon another under a distinct and independent contract; hence a mechanics' lien for a general balance of an account for labor performed in erecting a block of houses under separate and independent contracts as to the different parts of the block, could not be maintained upon the whole block as one estate.<sup>2</sup> Where a firm which had contracted to furnish certain machinery were converted into a corporation before the contract was completed, the corporation undertaking to carry out the contracts of the firm, and succeeding to all its property, rights, and credits, it was held that a claim for machinery furnished by the firm under the uncompleted contract could not be combined with one for machinery furnished by the corporation under the same contract, and the whole filed as one account for a lien. So, where a firm for which machinery was furnished under a contract was converted into a corporation before the completion of the contract, the same principle was held to apply.<sup>3</sup> But in another case, where a dwelling-house was erected under a written contract, and other buildings on the same lot of land, under a parol contract, they were both properly joined in the same notice of lien. The fact that they grew out of separate contracts can have no effect upon its validity so long as both claims are upon the same property. The case would be different if they were built on separate parcels of land.<sup>4</sup> A mechanic, in an action to enforce a lien for work, may unite a cause of action for work furnished a contractor, with a cause of action for work furnished at the request of the owner.<sup>5</sup> Where several houses or a house and a barn are erected by one contractor for one owner, under separate contracts, a sub-contractor cannot have a lien *in solido*, — he works subject to the original contract.<sup>6</sup> Where a builder erected two houses for adjoining owners under separate contracts, and a plumber contracted with him to do the plumbing for both houses under an entire contract for an entire price, it was held that the plumber could not maintain a lien suit, under ch. 191 of the Mass. Pub. Stats., because it would be impossible to show in his several suits against the owners, "the price agreed upon for the

<sup>1</sup> Larkins v. Blakeman, 42 Conn. 292.

<sup>2</sup> Landers v. Dexter, 106 Mass. 531.

<sup>3</sup> Allen v. Frumet Mining Co., 73 Mo.

688.

<sup>4</sup> Fitch v. Baker, 23 Conn. 563.

<sup>5</sup> Quale v. Moon, 48 Cal. 478.

<sup>6</sup> [Knauff v. Miller, 45 Minn. 61, 63 ;  
Bevan v. Thackara, 143 Penn. 182, 200.]

entire contract" (in reference to the defendant), by which sum the statute limits the lien.<sup>1</sup> The dissolution of a co-partnership breaks the continuity of a running account against it, and necessitates a new contract, express or implied, with the new firm. The lien claims must be filed separately under such contracts, and not joined in one account.<sup>2</sup> But separate contracts with the same person may be joined in one claim. The evidence disclosed that the work embraced in the lien account had been contracted for and done under two separate and distinct written contracts made thirteen days apart; and it is argued that for this reason the work done under these two contracts could not be embraced in one lien and enforced in a single action. No authority has been adduced which supports this suggestion. It is immaterial under how many contracts the work was done, provided all the contracts were between the same parties, and provided further that the lien is filed within the statutory time after the date of the last item done under each contract.<sup>3</sup> A corporation having furnished, under contract, a part of the materials for a house, and then made an assignment, and the assignee, having by order of the court completed the contract, may properly file one lien for the separate accounts, one of which is kept in his own and the other in the assignor's name, where both accounts are within the time limited by law.<sup>4</sup> In Illinois a joint claim may be made against two buildings erected on the same lot at different times, and under different unrecorded contracts, but for the same original contractor.<sup>5</sup> Under a statute providing that "any number of persons claiming liens may join in the same action," several may join who have liens on adjoining mining claims, all having the same ditch as a backbone, owned by the same person, and operated as one piece of property.<sup>6</sup> Where several liens are united, if the facts of each are distinctly stated it is sufficient, although the liens are not numbered or otherwise formally designated.<sup>7</sup> But if the materials supplied for each house are not specified in a joint claim, the lien is postponed to liens that are thus specific. But the owner cannot object on such account.<sup>8</sup>

§ 376. **Effect of Houses, etc., being separated.**<sup>9</sup> — If the work be done or materials are furnished upon distinct premises, the lien

<sup>1</sup> [Cahill v. Capen, 147 Mass. 493; citing Childs v. Anderson, 128 Mass. 108.]

<sup>2</sup> [Henry v. Mahone, 23 Mo. App. 83.]

<sup>3</sup> [Kearney v. Wurdeman, 33 Mo. App. 447, 456.]

<sup>4</sup> [Gibson v. Nagel, 15 Mo. App. 597.]

<sup>5</sup> [Booth v. Pendola, 88 Cal. 36.]

<sup>6</sup> [Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 582.]

<sup>7</sup> [Booth v. Pendola, 88 Cal. 36.]

<sup>8</sup> [Id.]

<sup>9</sup> This section was cited with approbation in Fitzgerald v. Thomas, 61 Mo. 502; McGrew v. McCarty, 78 Ind. 496.]

must be against each of the several premises, according to the value of the work and materials incorporated in each, and not against both for the aggregate amount.<sup>1</sup> So the liens for a house and barn cannot be the subject of a decree of sale *in solido*, where the township's line separates the tract on which the house is located from that on which the barn is built.<sup>2</sup> So, where the lien is sought against several separate buildings, the decree must be against each, for the value of work and materials on it, and not against all for the aggregate value of work and materials on all.<sup>3</sup> Where work is done on different parcels of property, the lien claimed on one is to be considered separately from the lien claimed on the other.<sup>4</sup> The reason a joint claim may be sustained against several houses put up at the same time, without an interval between them, is that they may be considered as one building, and consequently as an integer or unit which may be covered by one claim. But this cannot be asserted with any truth in a case where there is an interval, however small, which prevents the whole from being one continuous structure. It has accordingly been held that a joint claim against separate blocks of houses in different streets is a nullity, and the same principle applies to different blocks on different sides, or on the same side, of the same street, and in every instance where the structure against which the claim is filed is not substantially one building.<sup>5</sup> There can be no lien *in solido* upon several houses not on contiguous lots.<sup>6</sup> But a private alley separating two rows of buildings constructed under one entire contract will not prevent a lien *in solido* on them all, and the claim will be apportioned among them.<sup>7</sup> A lien was filed against "a double dwelling-house." The structure was divided from the bottom to top by a studding partition with no doors, and occupied separately. Held, to be two houses.<sup>8</sup> So, where there is a contract to furnish all the materials which a builder may require who contemplates building several houses on different lots, whether in the same city or not, different accounts are to be kept, and there must be a separate and distinct lien on each separate building; and a certificate which includes them all in one, thus making the whole together liable for the materials furnished to each

<sup>1</sup> Steigleman v. McBride, 17 Ill. 300; Goepp v. Gartiser, 35 Penn. 130; Wharton v. Douglas, 92 Penn. 66; [McGrew v. Major v. Collins, 11 Bradw. 658, 663.]

<sup>2</sup> [Lone v. Whittemore, 19 Bradw. 447, 449; citing Woodburn v. Gifford Co., 66 Ill. 285.]

<sup>3</sup> Culver v. Elwell, 73 Ill. 536.

<sup>4</sup> Davis v. Alvord, 94 U. S. 545.

<sup>5</sup> Campbell v. Furness, 1 Phila. 372; Chambers v. Yarnall, 15 Penn. St. 265;

<sup>6</sup> [Rice v. Nantasket Co., 140 Mass. 256.]

<sup>7</sup> [Goldheim v. Clark & Co., 68 Md. 498, 503; citing Fitzpatrick v. Allen, 80 Penn. 292.]

<sup>8</sup> Malone's Appeal, 79 Penn. 481.

separately, is void.<sup>1</sup> Again, when the lien is "on the building for which the work was done or the materials were furnished," a lien claim filed upon separate buildings and upon distinct lots of land, without apportioning the claim and designating specifically the amount claimed upon each, is not valid, and will be postponed to the claims of other encumbrancers. The policy of the law rests upon the idea of recompensing the mechanic and material-man to the value of the work done or materials furnished, in the construction of the building whose value he has contributed to increase. Under the French law, architects, masons, and others employed in building are privileged creditors only to the amount of the increased value resulting from the work which they have done.<sup>2</sup> So, if materials were furnished at different times in the same year for the erection of buildings on adjoining lots, but separate accounts were not made of the materials furnished for the buildings on the different lots, — the items being all entered in one general account, in the order of the dates of delivery, the lien will attach to the several buildings and lots for the use of which they were respectively furnished.<sup>3</sup> Where "mechanics furnishing materials for any building may have a lien separately or jointly upon the building," and the lien "shall relate to the time when the work on said building," etc., the statute contemplates only a separate lien upon a single building, and not a joint lien on several buildings.<sup>4</sup> The fact, however, that a block of buildings is erected on several lots of ground does not make them distinct and separate erections. If the lots are contiguous, and the entire block is compact, as one building under one roof, it is proper to decree the lien against the entire block.<sup>5</sup> But in another case it was held, where a party contracted to labor at a sum certain per annum, and work one half of his time upon H.'s quartz lode, and the other half upon H.'s mill, in which the quartz taken from the lode was to be worked, that he could secure payment by filing in the same action one lien upon the lode and mill, or two separate liens upon said property.<sup>6</sup>

§ 377. **Effect of Mistake.** — If the lien be void in consequence of being joint, when it should have been several, the defect cannot be remedied by proving on the trial what materials were furnished for each house. Such a claim is not good as a lien

<sup>1</sup> Chapin v. Persse, 30 Conn. 461.

<sup>2</sup> Morris City Bank v. Rockaway M'fg Co., 16 N. J. Eq. 150.

<sup>3</sup> Beckel v. Petticrew, 6 Ohio St. 247.

<sup>4</sup> Hill v. Braden, 54 Ind. 72; Hill v. Ryan, Id. 118.

<sup>5</sup> James v. Hambleton, 42 Ill. 308.

<sup>6</sup> Alvord v. Hendrie, 2 Mont. 115.

against each house for the materials furnished for each.<sup>1</sup> So, where a claim not filed according to the requirements of the statute constitutes no encumbrance upon the premises, it does not remedy the objection that it appears by the evidence that the claim may be apportioned between the different buildings in proportion to the value of the materials used in the construction of each of them.<sup>2</sup> A joint claim filed will not be supported by proof of a separate right of action.<sup>3</sup> Nor, in case of a claim filed against a block of buildings, will joint entries in the book of original entries of the material-man for lumber furnished for the same and another block, unaccompanied by any other evidence to show that the lumber was furnished for the block in question, be admissible in proof of the claim.<sup>4</sup>

<sup>1</sup> *Gorgas v. Douglas*, 6 Serg. & R. 512.

<sup>3</sup> *Barker v. Maxwell*, 8 Watts (Penn.), 478.

<sup>2</sup> *Morris Co. Bank v. Rockaway Mfg Co.*, 16 N. J. Eq. 150.

<sup>4</sup> *Chambers v. Yarnall*, 15 Penn. 265.

## CHAPTER XXXII.

## DESCRIPTION.

§ 378. **Lien extends only to Property described.** — The description of premises on which the lien is claimed is usually important in the notice or claim of lien, and in the complaint, petition, or *scire facias*. Without such description the notice would frequently be of no utility to the owner, and never of value to purchasers or creditors. When, therefore, a statute which creates the lien provides for a description of the property, it is a matter of such importance that, if none be attempted, or if it be so imperfect as not to answer its office, the lien itself will fail. Neither can it extend beyond the description of the property in the claim filed; for as to property not within the description it gives no notice; as where a claim is filed against a building and "the lot on which it is erected," without other description, the lien does not extend to the adjoining ground as appurtenant to the building.<sup>1</sup> The description must also correctly point out the property to be charged with the lien. A creditor cannot claim against a building in one public street, and sell by his execution a building in another.<sup>2</sup> If the notice omits to describe the real estate on which the lien is claimed, it is fatally defective.<sup>3</sup> A general mechanics' lien law provided that "all persons performing labor or furnishing material, etc., for any house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure, may have a lien, separately or jointly, upon the house, mill, manufactory, or other building, bridge, reservoir, system of water-works or other structure, which they may have erected, etc., and on the interest of the owner of the lot or land on which it stands, or with which it is connected," etc.; and the notice of lien shall give a "substantial description of such lot or land on which the house, etc., may stand or be connected with," etc., it was held that a contractor who had put up certain lines of wire on poles for a telegraph,

<sup>1</sup> McDonald v. Lindall, 3 Rawle (Penn.), 492.

<sup>2</sup> Simpson v. Murray, 2 Penn. 76.

<sup>3</sup> [Penrose v. Calkins, 77 Cal. 396.]

and who did not describe in his notice of lien the lot or land on which the structure stands on which he claimed a lien, loses his lien because of his omission of such description.<sup>1</sup> When, however, there is nothing in the statute looking to a description of the premises in the notice of lien, none need be given.<sup>2</sup> As where "any sub-contractor, journeyman . . . may give to the owner, or, if said owner is absent, to his agent in charge of said building, notice in writing, particularly setting forth the amount of such claim . . . for which his employer is indebted to him, and that he holds the owner responsible for the same, and the owner shall be liable for such claim," etc., the notice here provided for need not describe the premises.<sup>3</sup> In Georgia a laborer's lien covers *all* the debtor's property, and no description is necessary.<sup>4</sup>

§ 379. **Rule as to when Description is sufficient.**<sup>5</sup>—Several general rules have been adopted by courts as standards by which the adequacy of a description is to be tested; but notwithstanding a general harmony of principle, the results of their application, in analogous cases, have not always been uniform. Among those laid down, and probably the best rule to be adopted, is, that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient.<sup>6</sup> There is great reluctance to set aside a mechanics' claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise.<sup>7</sup> It is enough that the description points out and indicates the premises, so that, by applying it to the land, it can be found and identified.<sup>8</sup> A description that identifies is sufficient, though inaccurate.<sup>9</sup> If the descrip-

<sup>1</sup> [Vane v. Newcombe, 132 U. S. R. 220.]

<sup>2</sup> Gilman v. Gard, 29 Ind. 291.

<sup>3</sup> O'Halloran v. Leachey, 39 Ind. 150.

<sup>4</sup> [Love v. Cox, 68 Ga. 269.]

<sup>5</sup> This section was cited with approbation in De Witt v. Smith, 63 Mo. 266.

<sup>6</sup> [Willamette, &c. Co. v. Kremer, 94 Cal. 205; Martin v. Simmons, 11 Colo. 411, 414, citing Phillips, §§ 379, 380; Nystrom v. London, &c. Mortg. Co., 47 Minn. 31; Bradish v. James, 83 Mo. 313, 317; Holland v. McCarty, 24 Mo. App. 82, 89; Brown v. Wright, 25 Id. 54; White Lake L. Co. v. Russell, 22 Neb. 126, 129, citing Phil. § 379; Kezartee v. Marks, 15 Oreg. 529; De Witt v. Smith,

63 Mo. 263; McClintock v. Rush, 63 Penn. St. 203; Kennedy v. House, 41 Penn. St. 39; Knabb's Appeal, 10 Penn. St. 186; Parker v. Bell, 7 Gray, 429; Crawfordsville v. Boots, 76 Ind. 32; Tibbetts v. Moore, 23 Cal. 298; Barker v. Conrad, 12 Serg. & R. 301; Mountain City Market House v. Kearns, 103 Penn. 403; Linden Steel Co. v. Ref. Co., 138 Penn. 10; Scholes & Goodall v. Hughes & Boswell, 77 Tex. 482.]

<sup>7</sup> McClintock v. Rush, 63 Penn. 203.

<sup>8</sup> [Curnow v. Blue Gravel, &c. Co., 68 Cal. 262.]

<sup>9</sup> [Russell v. Hayden, 40 Minn. 88, citing Phil. § 379.]



tion identifies the property by reference to facts, that is, if it points clearly to a piece of property, and there is only one that will answer the description, it is sufficient.<sup>1</sup> The addition of a false circumstance is harmless.<sup>2</sup> So a notice which identifies the property is not invalidated by a mistake in the description, as naming the wrong township or section.<sup>3</sup> A notice describing the building on lot 9 instead of 11, but otherwise certainly identifying property, is not demurrable.<sup>4</sup> So "lot 6, block 28, of the Huber tract, southwest corner Hop and Eighth streets" is good, although "southwest" should have been "northeast." The rest of the description fixes the property, and "southwest" may be rejected like a false call in a deed.<sup>5</sup> Thus, a description as "a dwelling-house, situated in D., on land now or formerly of B., and now said to belong to A.; said house is new, and near the dwelling-house of B.," was held sufficient. So, a "dwelling-house situated on a piece of land in D., on a street or lane leading from E. Street, nearly opposite C. Street, and near the house occupied by B.; and the lot on which the same stands is the same that was conveyed by H. to said B. and A., as tenants in common," was upheld.<sup>6</sup> So, where the claim described the property thus: "House on the southwest corner of Fourth and Oak Streets, in Terre Haute, Indiana, with lot."<sup>7</sup> So, an account stating that the materials were delivered to the contractor named, "for John Brown's house, in Delaware, Twelfth Street, below Bedford Street," was considered as good a designation as the more tautological phrase of the legislature.<sup>8</sup> So a claim filed "against A. and B., the owners, or reputed owners, of a three-storied brick house, situate on the south side of Walnut Street, between Eleventh and Twelfth Streets, in the city of Philadelphia," was held sufficiently accurate.<sup>9</sup> So, a lien describing "the said building as that known as the Odd Fellows' Hall," and accompanied by a bill of particulars, stating that the materials were "delivered for the Odd Fellows' Hall, at Columbus, Pa.," is a good description.<sup>10</sup> In a notice of intention to hold a lien, the premises were described as a "certain build-

<sup>1</sup> [Seaton v. Hixon, 35 Kan. 663; see § 382.]

<sup>2</sup> [N. W. Pavement Co. v. Seminary, 43 Minn. 449, 452; Bailey v. Galpin, 40 Minn. 319; Adamson v. Peterson, 35 Minn. 529; McAllister v. Welker, 39 Minn. 535; N. W. Pavement Co. v. Norwegian Seminary, 43 Minn. 449, citing Phil. § 379.]

<sup>3</sup> [McNamee v. Rauck, 128 Ind. 59, 64, citing Phil. § 382.]

<sup>4</sup> [Newcomer v. Hutchings, 96 Ind. 119.]

<sup>5</sup> [Willamette, &c. Co. v. Kremer, 94 Cal. 205.]

<sup>6</sup> Parker v. Bell, 7 Gray (Mass.), 429.

<sup>7</sup> Caldwell v. Asbury, 29 Ind. 451.

<sup>8</sup> Kelly v. Brown, 20 Penn. 446.

<sup>9</sup> Harker v. Conrad, 12 Serg. & R. 301.

<sup>10</sup> Odd Fellows' Hall v. Masser, 24 Penn. 507.

ing three story high, with the lower story finished off with a stone front, and situated on the eighteen feet on the east side of town-lot number fifty-eight, in Washington, formerly called Liverpool, in said county previously named," it was sufficient.<sup>1</sup> A description as "building No. 181 South Leavitt Street, in the city of Chicago, and further described as lot 8 and 19 in block No. 1 of Banks' sub-division of lot 9 in block 11 of Rockwell's addition to Chicago," was held sufficient.<sup>2</sup> "Two two-story brick houses (with mansard roof) adjoining each other on a lot at the southeasterly intersection of Delaware Avenue and Rodney Street in the City of Wilmington, with the number of feet on each of them and on the other two lines of it stated," is a sufficient description of the several pieces of ground on which the houses are respectively situated.<sup>3</sup> A description that the labor was performed on a block of seven houses, situated on corner of Tremont and Kendall Streets, in the city of Boston, supposed to belong to Dr. T. H. Smith—the land on which said building was situated measuring about one hundred and fifty feet on said Tremont Street, and bounded north-westerly on Tremont Street, and north-easterly on Kendall Street, was sufficient, and sufficiently identified the owner.<sup>4</sup> Where the judgment is authorized against a building alone, with reasonable time for removal, a description "the following described real estate, to wit, the Nelson House Building, situated on lots 27 and 30, and 40 feet off the south side of lot 26," is sufficient.<sup>5</sup> Again, in a petition, a description of the lot as being "number seven hundred and fifty-one, in the city of Dubuque," was sufficient; and, also, the following description of the house, viz.: "A brick house upon said lot, to be twenty feet by thirty, two stories high and a cellar." This description by number of the lot is *prima facie* sufficient; and it is incumbent upon the defendant to show wherein the defect or uncertainty consists.<sup>6</sup> The general rule hereinbefore mentioned is not altered, although the law may require a "correct" description of the property to be given. The term "correct description" means only such description which identifies the individual object intended to be designated; and, therefore, where the subject of the lien was described as "the works known as the South Fork Canal, near Placerville, in Eldorado County," it was sufficient.<sup>7</sup> "The brick city hall building to be erected in the city

<sup>1</sup> O'Halloran v. Leachey, 39 Ind. 150.

<sup>2</sup> Buckley v. Boutellier, 61 Ill. 293.

<sup>3</sup> France v. Woolston, 4 Houst. (Del.)

557.

<sup>4</sup> Patrick v. Smith, 120 Mass. 510.

<sup>5</sup> Kansas City Hotel v. Sauer, 65 Mo. 288.

<sup>6</sup> O'Halloran v. Sullivan, 1 Iowa, 75.

<sup>7</sup> Gordon v. South Fork Canal Co., 1 McAll. C. C. 513.

of Hillsboro," is sufficient to fix the premises.<sup>1</sup> In a petition for a lien it is sufficient to describe the building for which the materials were furnished as "a certain building," if the land on which the building stands is accurately described.<sup>2</sup> When it affirmatively appears that the land where the building was erected did not belong to the person who caused such building or other improvement to be erected or repaired, the lien could only extend to the building or other improvement, and it would not be defeated by failing to describe the land, if such building or other improvement were sufficiently described for the purposes of identification.<sup>3</sup> A description of improvements sought to be charged by the lien as "the recently erected two-story frame dwelling, and improvements of the said M. C. R., which are now occupied as a dwelling-house by him and his family," is sufficient as to the dwelling, but not as to the other improvements.<sup>4</sup> Describing the property as a "steam saw-mill located at Emerson" is sufficient where no lien is claimed on the land.<sup>5</sup> "A lot of logs marked F. & A. now lying in Ebey's Slough" is sufficient. "Lot" means all logs so marked.<sup>6</sup> A statement that the building is on lot 8 in block 32 of a certain town is a sufficient description of the building.<sup>7</sup>

§ 379 *a*. **Insufficient Description.** — A notice that fails to name the city or county in which the property is situated, and containing no circumstances identifying the property, is insufficient against a *bona fide* purchaser for value without notice of the lien.<sup>8</sup> A notice of lien that describes the building as one of seven distinct buildings, situate on two certain lots, and sets forth that the demand is for one-seventh of the aggregate of labor done and material furnished in the erection of the seven buildings, is void for uncertainty.<sup>9</sup> "Thirty lengths of corn-cribbing at Mills Station, P. County, Iowa," is too indefinite.<sup>10</sup> A notice of claim of mechanics' lien, which describes the land as "being seventy feet on Pike Street, and on the southerly line thereof, by seventy-five feet front on Fourth Street, and on the westerly line thereof, excepting a space of twenty-two feet more or less wide on Pike Street by about twenty-five feet deep," is so

<sup>1</sup> [Scholes & Goodall v. Hughes & Boswell, 77 Tex. 482.]

<sup>2</sup> [North v. La Flesh, 73 Wis. 520.]

<sup>3</sup> [Keartee v. Marks, 15 Oreg. 529; see § 379 *a*.]

<sup>4</sup> [Turner v. Robbins, 78 Ala. 592.]

<sup>5</sup> [Emerson & Co. v. Gainey, 26 Fla. 133.]

<sup>6</sup> [Wheeler v. Port Blakely M. Co., 2 Wash. Ter. 71.]

<sup>7</sup> [Whiteside v. Lebecher, 7 Mont. 473, 478.]

<sup>8</sup> [Anderson v. Bingham, 1 Colo. App. 222.]

<sup>9</sup> [Merchant et al. v. Humeston et al., 2 Wash. Ter. 433.]

<sup>10</sup> [Roose v. Billingsly, 74 Iowa, 51.]

indefinite and uncertain as to the tract excepted that a decree of foreclosure cannot be based thereon.<sup>1</sup> A lien account described the premises as a frame barn and one acre on which the same is situated, being erected on a tract of sixty-four acres, being all of the north half of the southwest quarter-section twelve, etc., and lying west of the branch, etc. Held, if the rights of third persons were to be affected by the lien sought to be enforced, the vagueness and uncertainty of the description would be fatal to the lien. But where the contest is wholly between the materialman and the land owner whose property has been improved by the furnished material, the true doctrine seems to be that, if the description is specific and definite enough to enable one familiar with the locality to identify the premises intended to be covered by the lien, it will be sufficient; and it is held that the owner is presumed to be sufficiently familiar with the premises to locate and identify the acre intended by the foregoing description, and other facts contained in the lien paper.<sup>2</sup> A description that does not identify is insufficient, as that the materials were for a line of railway owned by defendant in a certain city in which defendant owned several lines of railway.<sup>3</sup> A description too vague to authorize a lien against the land may, however, be sufficient to hold the building.<sup>4</sup>

§ 380. **The Same applies to Complaint, etc.** — When the sufficiency of the description contained in the petition or complaint has been under discussion, the same rule as mentioned in the preceding section has been generally adopted to test its validity. Thus, a petition alleged "that the house is situated on a tract of twelve acres, more or less, included in" a certain quarter-section of land, which was described in the petition, "and in that portion of said quarter-section known and described as W. Campbell's addition to Galena; and the said house is known and designated as 'Argyle Cottage,' in which said W. Campbell now resides," was held to be too indefinite because it would be impossible for the sheriff to point out and locate the premises, should he be directed to sell them under a special execution.<sup>5</sup> So, a description, "two three-story brick houses on the east side of Fifth Street, between Franklin Avenue and Morgan Street," was held insufficient, as it did not sufficiently identify the subject of the lien, so as to enable the officer to execute a special *feri*

<sup>1</sup> [Kellogg v. Littel & Smythe M'fg Co., 1 Wash. 407; Cowie v. Ahrenstedt, 1 Wash. 416.]

<sup>2</sup> [Rall Bros. v. McCrary, 45 Mo. App. 365.]

<sup>3</sup> [Fleming v. St. Paul City Ry. Co., 47 Minn. 124, 126.]

<sup>4</sup> [Rall Bros. v. McCrary, 45 Mo. App. 365; see § 379.]

<sup>5</sup> Turney v. Saunders, 5 Ill. 527.

*facias*.<sup>1</sup> When a special security and remedy are given to a favored class of creditors, they must conform with reasonable accuracy to the provisions of the law designed for their benefit; and therefore property against which the lien is given must be so accurately described, that when judgment is obtained on the *scire facias* a separate schedule will not be required to be annexed to the *levari facias* for the guidance of the sheriff.<sup>2</sup> But in a case where the number of the house was unknown, it was said that a general statement that the building is situate on the west side of a street, between two streets named, may be sufficient in a notice of lien, on the assumption that the plaintiff did not know the number; but the complaint should enlarge the description in such manner that the sheriff, in the event of the defendant's having more than one building in the locality, would be able to determine by the judgment beyond doubt the premises to be sold.<sup>3</sup> Again, it has been said that where a party seeks to enforce a lien, he must describe the land with sufficient accuracy to enable the court to decree the sale, and the purchaser to find the land, under such description.<sup>4</sup> The description of the property in the notice or claim of lien and in the petition should substantially agree.<sup>5</sup>

§ 381. **Convenient Certainty.** — Another, but less accurate, mode of stating the same principle is, that the property must be described with convenient or reasonable certainty. An act required "the locality of the building, and the size and number of stories of the same, or such other matter of description as shall be sufficient to identify the same," to be given; it was said that the building must be described with at least convenient certainty, as regards both its locality and structure; and that a description of a building "as a double saw-mill in Clarion County, situate on the waters of the Clarion River, and on the east side of the said river," was too vague, as the waters of the river embrace the whole county, and the description was not more precise than it would have been to have stated it was in the county, which would evidently have been insufficient. The office of the description is to give notice to purchasers and creditors, who are surely not expected to explore the course of a river in order to discover whether the particular property was intended.<sup>6</sup> In another case, it was held that describing property

<sup>1</sup> Matlack v. Lare, 32 Mo. 262.

<sup>2</sup> Ely v. Wren, 90 Penn. 148.

<sup>3</sup> Duffy v. Brady, 4 Abb. Pr. (N. Y.), 432; s. c. 3 E. D. Smith, 657.

<sup>4</sup> Knox v. Starks, 4 Minn. 20.

<sup>5</sup> Bristow v. Evans, 124 Mass. 548.

<sup>6</sup> Washburn v. Russell, 1 Penn. 499.

with convenient certainty in the notice of lien is sufficient; as "a wharf situated on Battery Street, between Pacific and Jackson Streets, in San Francisco."<sup>1</sup> So "that certain mine commonly called 'Red Cloud Mine,' situate in Bodie Mining District, Bodie Township," with courses and distances is sufficient, when it appears from the evidence that the mine was well known by the above name.<sup>2</sup> "Certainty to a common intent" is all that is required in the description in a mechanics' claim. A description of property as follows: "said building is a dwelling-house of two stories, having a front of sixteen feet and depth of thirty feet, and situate on lot No. 10, in the borough of Mahanoy City, in the county of Schuylkill aforesaid, constructed by Frank Carter, in July, A.D. 1849," was held to be sufficiently certain.<sup>3</sup> A description, "a part of lot No. 10 as the same is designated on the original plat of the city of Crawfordsville, and the building situated thereon, lately erected, known as the City Building or Engine," is sufficient description of so much of the lot as was covered by the building, which is sufficiently described.<sup>4</sup> But where the notice was for work done on No. 370 Fourth Avenue, and the proof showed there were five houses, and No. 370 was one of them, but it did not show which of the five was No. 370, nor that the whole five were known by that number; but the proof did show that the great bulk of the work was done on the second house, and the only work done on all was the resetting some flagging, — this proof did not establish any work was done on No. 370 other than the flagging. If a diagram be filed as a part of the claim, and it is so defective as to show that no work was done on the premises shown by it, there is no lien.<sup>5</sup>

§ 382. **When no Other Property answers the Description.** — The fact that no other property exists which answers in any manner to the description has been considered to aid what might otherwise be an insufficient description. A mechanics' lien which described the property as a "quartz mill, being at or near the town of Scottsville, in Amador County, known as Moore's New Quartz-Mill," contained a sufficient description to identify the property and uphold the lien, where there was no evidence that there was any other quartz-mill at the place so designated as to render it uncertain which was intended.<sup>6</sup> Where the petition showed defendant owned certain described lots, and the contract,

<sup>1</sup> *Hotaling v. Cronise*, 2 Cal. 60.

<sup>2</sup> [*Tredinnick v. Mining Co.*, 72 Cal. 78, 80.]

<sup>3</sup> [*Holland v. Garland*, 13 Phil. 544.]

<sup>4</sup> *City of Crawfordsville v. Boots*, 76 Ind. 32.

<sup>5</sup> *Donnelly v. Libby*, 1 Sweeny (N.Y.), 259.

<sup>6</sup> *Tibbetts v. Moore*, 23 Cal. 208.

which was made part of the petition, showed the plaintiff was to furnish the materials for a house on his lots in the same town without describing them, and the petition claimed a lien on the lots described, the answer did not deny such ownership, and the proof showed the building upon the lots of defendant but did not show defendant owned any other lots, it was held sufficient to authorize a decree.<sup>1</sup> A mill worked by water at the time of filing a lien against it, but afterwards by steam, and being two stories high, with a low stone basement, and a window in the gable end, was described as a two-story frame steam grist-mill, with an accurate description as to location; this description was held good, if no other mill existed in that locality by which persons could be misled.<sup>2</sup> A building was described as "situate on west side of Thirteenth Street, between Vine and James Streets, in Philadelphia, belonging to C. S., when, in point of fact, it was between Callowhill and James, — Callowhill Street intervening between Vine and James, — the description was sufficiently certain, C. S. having no other house in that street.<sup>3</sup> A claim against "a house and lot in A. township, B. county, belonging to J. M. H., bounded by the lands of L. and others," with a statement of the material of which it was constructed, its dimensions, and number of stories, is sufficiently descriptive of the locality, it not appearing that J. M. H. had other lands in the same township.<sup>4</sup> A building described as situate "in Dillersville, adjoining lands of P. H. and the Pennsylvania Road," was sufficient, it not being shown that there was any other building there answering to that description.<sup>5</sup> But as against an innocent purchaser, the fact that the party owned no other house answering to the description will not cure the defect.<sup>6</sup>

§ 383. **Rules applicable to Deeds.** — The rules of descriptions in deeds have also been applied to mechanics' liens. Premises once sufficiently described, the addition of a circumstance false, or mistaken, will not vitiate the description. Thus, property upon which a lien was claimed was described in the petition and complaint as "the several buildings known as the gas-works of the La Crosse City Gas Light & Coke Company, situated on lots numbered 8, 9, etc., in block 14," whereas the buildings were situated on other premises in the same city, — this latter averment did not invalidate the previous accurate statement.<sup>7</sup>

<sup>1</sup> *Lombard v. Johnson*, 76 Ill. 599.

<sup>2</sup> *Brundage v. Phillips*, 3 Grant Cas. (Penn.) 313.

<sup>3</sup> *Springer v. Keyser*, 6 Whart. (Penn.) 187.

<sup>4</sup> *Knabb's Appeal*, 10 Penn. 186.

<sup>5</sup> *Shaffer v. Hull*, 2 Penn. L. J. 93.

<sup>6</sup> *Montrose v. Conner*, 8 Cal. 344.

<sup>7</sup> *Brown v. La Crosse City*, 16 Wis. 555.

Where a law requires that the contract should be made with reference to some particular land, it is not necessary to describe it by metes and bounds, or by numbers; if it described it as a mill at Marseilles, and it does not appear that the defendant has more than one mill at that place, it would be sufficient in a deed to pass the title; and no reason is perceived for greater accuracy to enable the parties to create this lien.<sup>1</sup> Only such mistakes as are calculated to mislead subsequent purchasers or creditors should destroy the claim. The object which the legislature had in view is attained by setting forth on the record such matters as will leave no reasonable room to doubt the particular building intended against which the claim is filed.<sup>2</sup> So that, when an error in description is so perfectly apparent that no one could be deceived or misled by it, it may be disregarded, as where the word "north" was used instead of "south," and was clearly inconsistent with the rest of the description. So, a reference to a deed which contained a correct description is sufficient to cure this error.<sup>3</sup> Again, a claim filed mentioned the county, village, road on which the property fronted, the owners of the adjoining property, the materials of which the building was constructed, the number of stories, and gave the proper width in front, but the depth incorrectly, — this mistake did not avoid the lien.<sup>4</sup> But it has been held not to be an immaterial defect to describe erroneously property as lots "6 and 7," the true description being "3 and 4."<sup>5</sup> So, where the property was described as a dwelling-house, situated on the south end of lot 6, "to which the said R. has a leasehold interest," and it turned out that R.'s leasehold interest was to the north one hundred feet of the lot; that R.'s dwelling was in the centre of the lot; and that another person owned a dwelling on the south end of lot 6, it was held that the notice was not sufficient, and that no lien attached.<sup>6</sup>

§ 384. **Question for Jury.** — In matters of description, it is impracticable for the court to decide what mistakes shall avoid the lien, and hence the only safe rule is to refer the question of identity to the jury, unless the claim or statement of demand is totally defective in giving information to purchasers and others making search for encumbrances, and is such as will not direct them to the right place. The court cannot take judicial cognizance of the circumstances of the neighborhood, which is abso-

<sup>1</sup> *Strawn v. Cogswell*, 28 Ill. 457.

<sup>2</sup> *Jones v. Shawhan*, 4 Watts & S. 257.

<sup>3</sup> *McCoy v. Quick*, 30 Wis. 521.

<sup>4</sup> *Kennedy v. House*, 41 Penn. 39.

<sup>5</sup> *Lindley v. Cross*, 31 Ind. 109.

<sup>6</sup> *Runey v. Rea*, 7 Oreg. 130.



lutely necessary to enable them, in case of latent ambiguity, to decide the question.<sup>1</sup> Accordingly, it has been decided that a mechanics' claim against a building "situate in Clinton Street, on the north side thereof, and one hundred and thirty feet east of Eleventh Street, containing in front on Clinton Street 20 feet," is not *per se* inconsistent with a deed describing a building as "situate on the north side of Clinton Street, beginning at the distance of one hundred and sixteen feet eastward from the east side of Eleventh Street, and containing in front on Clinton Street 20 feet." It should be submitted to a jury.<sup>2</sup> So, under an act which requires "such matters of description as shall be sufficient to identify the same," unless the description is manifestly insufficient, the question of identity is generally for the jury.<sup>3</sup> Whether the description is sufficient to identify the property is a question for the jury, where it is not on its face manifestly and utterly insufficient.<sup>4</sup>

§ 385. **Patent Ambiguities, etc.** — A description containing a patent ambiguity will not, however, be referred to a jury, but be declared by the court to be void for uncertainty; as where a notice described the property as follows: "A part of lot 3, section 36, township 33, range 4 west, containing five acres, situated in Starke Co., Ind." <sup>5</sup> Notice of an intention to hold a lien on "a part of lot No. 110" is inoperative and void for uncertainty. Such void notice cannot be made effective on some specific portion of such lot by averment that the notice was intended to apply to such specific part.<sup>6</sup> A description as "a two-story frame dwelling-house, on the north-west quarter of the south-east quarter of section 11, township 35, range 31, in the county of Vernon, in the State of Missouri, is bad, as there is nothing in this description to show on what part of the land the house in question is located, nor any attempt to describe the acre of land."<sup>7</sup> It was held that a description "being his dwelling-house situated at the intersection of K. and Seventeenth Streets, on lot — in square 164," was not sufficiently descriptive.<sup>8</sup> A description "said house is situated near the northeast corner of the northeast quarter of southwest quarter of section 9, etc.," is bad.<sup>9</sup> A claim for materials furnished towards the construction of two buildings described them as "situated on

<sup>1</sup> McClintock v. Rush, 63 Penn. 203.

<sup>2</sup> Ewing v. Barras, 4 Watts & S. 467.

<sup>3</sup> Kennedy v. House, 41 Penn. 39.

<sup>4</sup> [Cleverly v. Moseley, 148 Mass. 280.]

<sup>5</sup> Howell v. Zerbee, 26 Ind. 214.

<sup>6</sup> Irwin v. Crawfordsville, 72 Ind. 111 ;

s. c. 46 Ind. 441 ; City of Crawfordsville v. Johnson, 51 Ind. 398.

<sup>7</sup> Williams v. Porter, 51 Mo. 442.

<sup>8</sup> Basshor v. Kilbourn, 3 MacArthur (D. C.), 273.

<sup>9</sup> Wright v. Beardsley, 69 Mo. 548.

that part of North La Grange known as blocks 3 and 4 owned by" defendant. One of the buildings was erected on block 3, and the other on several of the lots which constituted block 4, and the blocks were separated by a street. Held, bad, because it failed to show on which block or lots the buildings were respectively situated; and this conclusion is not altered by the fact that the two buildings together constituted one establishment for manufacturing purposes.<sup>1</sup> So, where the description was "one acre, more or less, lying north of, and adjoining the north-west corner of Sixby's addition to the village of V.B., in the county of L."<sup>2</sup> Eighteen houses were erected; a claim filed against eight of them, without designating which, was held void for uncertainty.<sup>3</sup> So, a description of "a house and stable in North Queen Street, adjoining property of Jacob Zecker and others," and the name of the owner or reputed owner not given, was bad.<sup>4</sup> But a description which would be insufficient, as, "about three acres," in a particular "corner of a" certain "quarter-section," may be made good, if attendant circumstances are averred to help fix the precise location, which by the aid of extrinsic evidence would enable any one to locate the precise premises; as where the above description was further qualified by stating that "the defendant is now owning and in possession of said land, as he has been ever since the time above mentioned, and in his own right is now holding, and has been so holding, under a title bond for said land made by W. B. W."<sup>5</sup>

§ 386. **When Extrinsic Evidence Admissible.** — When the description is void for uncertainty on its face, parol evidence is inadmissible to remedy the defect.<sup>6</sup> Nothing but confusion and uncertainty could result, if this were allowed. Neither is it admissible to prove the description was intended to apply to the house sold, with knowledge of the owner.<sup>7</sup> Nor will allegations in the complaint, that the ownership of the property remained unchanged, that no third person had acquired any rights that would be affected by a correction of the mistake, and that the materials furnished were the only kind ever furnished by plaintiff to defendant, cure a radical misdescription, and the court has no power to reform it;<sup>8</sup> and, more particularly as against third persons, no material alterations can be allowed in the

<sup>1</sup> Lemly v. La Grange, 65 Mo. 545.

<sup>2</sup> Munger v. Green, 20 Ind. 38.

<sup>3</sup> Pennock v. Hoover, 5 Rawle (Penn.), 291.

<sup>4</sup> *In re Hill's Estate*, 2 Penn. L. J. 96.

<sup>5</sup> Quackenbush v. Carson, 21 Ill. 99.

<sup>6</sup> Munger v. Green, 20 Ind. 38.

<sup>7</sup> Simpson v. Murray, 2 Penn. 76.

<sup>8</sup> Lindley v. Cross, 31 Ind. 109.

notice, on filing a complaint upon it.<sup>1</sup> But where a party filed a notice of lien containing the right description of the lot, as No. 41, and subsequently filed his complaint to enforce it, and with it filed a written copy of the above-mentioned notice, and by mistake the lot was named 12 instead of 41 in the complaint, and the same clerical error was repeated in the decree, a correction of the mistake was allowed, as the notice filed with the complaint gave the true designation to the lot.<sup>2</sup> So, where the description was "lots lettered A. B. and C. in the sub-division of original lot No. 2 in square No. 791 recorded in the office of the surveyor of the city of Washington, in liber R. W. N. 1, folio 62," whereas the lots were situated in square No. 971, which was the square recorded at the place of reference; and where also the description contained in the notice was applicable alone to said last-mentioned square, and where also the owners had not been misled, and no other rights had intervened, the lien was upheld upon the ground that the property was sufficiently described.<sup>3</sup> A lien claim was held not fatally defective as between the mechanic and owner, which correctly designated the property as a "three-story brick building on lots 19 and 20," but by a clerical mistake misdescribed the block as No. 2, instead of No. 20, where the notice properly located the property, and the evidence showed owner had no other building, and owned no other lot than in block 20. But had a third party purchased without any other notice and relying thereon, the rule would have been otherwise.<sup>4</sup>

§ 387. **Claiming too much Land.**<sup>5</sup> — The general rule is that the inclusion of too much land in the description in notice, affidavit, petition, or other paper is not fatal in the absence of fraud.<sup>6</sup> The inclusion of land to which no lien attaches will not invalidate the claim of lien where no one has been misled or prejudiced thereby.<sup>7</sup> Describing too much land is not fatal, unless intentional and fraudulent, or injurious to the owner or third persons.<sup>8</sup> Claiming a lien against two distinct lots, where only one of them is subject, does not vitiate the lien against that sufficiently

<sup>1</sup> *Wade v. Reitz*, 18 Ind. 307.

<sup>2</sup> *Wasson v. Beauchamp*, 11 Ind. 18.

<sup>3</sup> *McLean v. Young*, 2 *MacArthur* (D. C.), 184.

<sup>4</sup> *De Witt v. Smith*, 63 Mo. 263.

<sup>5</sup> See Chapter XVII.

<sup>6</sup> [*Bradish v. James*, 83 Mo. 313, 317; *De Witt v. Smith*, 63 Mo. 263, 265; *Holland v. McCarty*, 24 Mo. App. 82, 89; *White Lake L. Co. v. Russell*, 22 Neb. 126,

130; *Bewick v. Muir*, 83 Cal. 368; *Scott v. Goldinghorst*, 123 Ind. 268; *Phillips*, § 388 (notice); *White Lake L. Co. v. Russell*, 22 Neb. 126 (affidavit); *Bissell v. Lewis*, 56 Iowa, 231.]

<sup>7</sup> [*North Star Iron Works Co. v. Strong*, 33 Minn. 1.]

<sup>8</sup> [*Lyon & Gribble v. Logan*, 68 Tex. 521.]

described.<sup>1</sup> Fraudulently or intentionally claiming too much land as subject to the lien renders the claim void, under a statute which requires the builder to file a certificate of his lien which shall "describe the premises." A party having a lien on one of three paper-mills, which were near each other and belonged to the same owner, but were independent and susceptible of a separate description, described the premises on which the lien was claimed as "two tracts of land, situate in the town of W., one of said tracts bounded north, south, and west by lands now or late of C., and on the east by the C. River, with two paper-mills thereon, and the other tract bounded north on lands of C., etc., with one paper-mill thereon," was held void for this cause. Or, if the description is so grossly inaccurate as to show that there was no attempt to give an accurate and true description, and more is thus included than is covered by the lien, the lien will fail. But a mere mistake in including more land than can be made subject to the lien, if not intentionally false, will not destroy the notice.<sup>2</sup> Again, where too much land was embraced in the claim of lien, and on discovering the mistake the lienors entered upon the land records a release, but which was not sealed, witnessed, or acknowledged, it was held the lien was nevertheless valid, it not appearing that there was any intention to deceive, or that any one had been injured.<sup>3</sup> So, if a lien claim *bona fide* describe an unnecessary quantity of land, and more than is included in the lot and curtilage upon which the building is erected, it will not be fatal to the claim. The lien will in that case be held good upon whatever property belongs to the lot and curtilage, and is necessary to the enjoyment of the premises, which is a question of fact.<sup>4</sup> Again, although a claimant embraces in his claim filed more property than by statute he is entitled to, if the claim distinctly show what buildings were erected by the labor and materials of the claimant, it is good to the extent it is recognized by the statute, if it be a mere mistake and works no injury.<sup>5</sup> And where a mechanics' lien attached to one acre, and a lien was filed embracing one acre and thirty-five hundredths acres, it was not void merely because it embraced more than one acre, — no fraud being suggested.<sup>6</sup>

§ 388. **Lot, Curtilage, Acre, etc.**<sup>7</sup> — When the lien is given by statute upon "a lot" or "curtilage," and the lot has been

<sup>1</sup> [Lane v. Jones, 79 Ala. 156.]

<sup>2</sup> Rose v. Persse, 29 Conn. 256.

<sup>3</sup> Shattuck v. Beardsley, 46 Conn. 386.

<sup>4</sup> Edwards v. Derrickson, 4 Dutch. (N. J.), 39.

<sup>5</sup> Whitenack v. Noe, 3 Stockt. Ch. (N. J.), 321.

<sup>6</sup> Oster v. Rabeneau, 46 Mo. 595.

<sup>7</sup> See section 201.

repeatedly sold and bought, and the owners always recognized one set of metes and bounds, and never made any other, claimants may adopt them in filing their liens; and are not compelled, when so doing, to cause a new survey to be made within narrower limits, which no one recognizes. The law, unless the amount of lot is specially restricted, intends that land enough shall be included, if there be enough in the lot, to satisfy the entire expense of building. It is impossible for the mechanic to determine in advance the amount. A building may readily be erected at such expense, and in such a place, that, if it has to be sold, it will not pay half of the claim. In such case, if the land be poor, it may take a large quantity of it to pay the mechanic; and the claimant should not be compelled, before he can possibly know what the result is to be in this respect, to limit his security to a lot of five, ten, or fifty acres. It does not follow that, because the lien is on a large tract, it must, of necessity, all be sold. This lien is just like any other lien; all that is necessary to do is to sell enough to pay the claims.<sup>1</sup> And, having seen<sup>2</sup> that the idea of a "curtilage" or "lot" may be expanded or contracted by the character and location of the erection standing upon it, and by the nature and extent of the business to be done there, it is highly probable that mechanics may honestly differ about the amount of land which can fairly be held by the lien, — it must be settled at the trial; and although the lien cannot lawfully be extended beyond the lands described in the lien claim, yet it does not follow that the claimant must necessarily enforce his lien on all the property he describes as a lot or curtilage, or else lose his entire claim.<sup>3</sup> So, on the other hand, the lien is not invalid, although it does not cover all the land connected with the building to which the owner has a title-deed.<sup>4</sup> Some allegation of the quantity of land sought to be made subject to the lien is generally necessary; as where "a description of the premises and all the material facts in relation thereto" was required, a complaint which did not show the quantity of land, or whether it was within the limits of any city, town, or village plot, was considered insufficient.<sup>5</sup> So, if the statute give the lien upon "one acre" only, it is necessary that the acre, if part of a larger tract, should be described in the lien claim required to be filed, in order that all persons may have

<sup>1</sup> Edwards v. Derrickson, 4 Dutch. (N. J.) 45.

<sup>4</sup> Smith v. Johnson, 2 MacArthur (D. C.), 481.

<sup>2</sup> Vide Chapter XVII.

<sup>6</sup> McCarty v. Van Etten, 4 Minn.

<sup>3</sup> Derrickson v. Edwards, 5 Dutch. (N. J.) 468.

notice of what land is affected by it. And where there is no provision of law by which the lien claimant is authorized to call upon or compel the owner of the land to designate the acre, he may designate it himself. If his designation may sometimes unnecessarily prejudice the rights of the land-owner, it is equally true that a designation by the land-owner may seriously affect the value of the lien.<sup>1</sup> In a later case, however, the court said that when the land connected with a building exceeds the one acre on which the statute gives a lien, it is sufficient to describe the entire premises in the affidavit and claim of lien. The court will carve out the acre.<sup>2</sup> But in Missouri it is held that where a lien is filed against a building in the country, and the acre of ground on which it is situated, the description must identify that particular acre, or the lien will fail.<sup>3</sup> The law of Missouri gives a lien on the "building and the land on which it is situated to the extent of one acre;" it was held that a description of a fifteen acre tract by the outside boundaries was invalid, as it was not sufficiently accurate to identify the acre subject to the lien.<sup>4</sup> The law required the statement to contain a "description of the property, or so near as to identify the same, on which the lien is intended to apply." Where the lien on the land fails because fifteen acres are described instead of the one acre named in the statute, the lien cannot be enforced as to the building alone; the whole lien is lost.<sup>5</sup> The court said, however, that if it were a matter of first impression the decision would be to the contrary. Convenient and reasonable certainty in the description of the property to be charged with the lien is requisite. The same certainty of description is requisite as in case of a levy under execution, so that the court may be informed what land to order sold, and the purchaser be able to locate it. Without such description no lien is acquired. So when the lien on the land is to the extent of one acre, and the tract of land contains more acres than one, the particular acre on which the lien is charged must be pointed out, and designated by a description sufficiently certain to identify and separate it from the balance of the tract. Accordingly where the lien is sought to be charged on the land on which a saw-mill and tram-road four miles in length are situate, and no attempt was made to point out and designate the

<sup>1</sup> Tuttle v. Howe, 14 Minn. 145.

<sup>3</sup> Williams v. Porter, 51 Mo. 442.

<sup>2</sup> [North Star Iron Works Co. v. Strong, 33 Minn. 1; (*dictum* in Tuttle v. Howe, 14 Minn. 113, 145 overborne); see also Smith v. Headley, 33 Minn. 384; Boyd v. Blake, 42 Minn. 1, 4.]

<sup>4</sup> [Ranson v. Sheehan, 78 Mo. 668,

<sup>5</sup> [Ranson v. Sheehan, 78 Mo. 668,

one acre, it was held defective description, and no lien resulted.<sup>1</sup> Where a lien extends only against the improvements erected, no description of the acre of land on which they are placed need be given.<sup>2</sup>

§ 389. **Court to determine Extent and Location of Land.** — Where, however, the law provides for the settlement, as part of the proceedings, of what curtilage shall go with the building, it matters not whether any, or what, is described in the claim filed,<sup>3</sup> if the locality and building be designated, as the parties are not bound by, nor is the extent of land that will pass by a sale under proceedings affected by, that set forth or claimed in the lien file.<sup>4</sup> So, where the statute declared that "the land upon which any building or superstructure shall be erected, together with convenient space around the same, or so much as may be required for the convenient use and occupation of the premises, shall be subject to the lien;" and the notice of lien and complaint described the land around the building in these words, "with such convenient space of land around the same as may be required for the convenient use and occupation thereof," — it was sufficient as a matter of description. It was proper for the court, by its decree, to define the amount and extent of the land connected with the building which was properly subject to the lien.<sup>5</sup> Where the complaint described the property as a large building on certain lots in a certain block belonging to the defendant, together with a convenient space of land around the same, it was sufficiently specific.<sup>6</sup> It is the duty of the court in all cases to send out a commissioner or other officer, or by other appropriate proceedings, to locate the land subject to the lien; otherwise, if there were several lienors, and the property subject was part of a larger tract, and they could select the premises themselves, one might locate the land connected with the building lying northward, and another southward, and so on.<sup>7</sup> In another case it was ruled that the description of land in a decree is defective if it wants certainty. The boundaries of the tract of which the sheriff is to place the purchaser in possession, should not be left to the sheriff, nor to adjustment between the purchaser and the owner of the remainder of the tract.<sup>8</sup> The judgment should not be for a greater amount of land than authorized by statute. For such error it will be invalid, and reversed.<sup>9</sup>

<sup>1</sup> [Montgomery Iron Works v. Dorman, 78 Ala. 218; Phillips, § 388, cited with approval.]

<sup>2</sup> [Turner v. Robbins, 78 Ala. 592; Bedsole v. Peters, 79 Ala. 133.]

<sup>3</sup> Lightfoot v. Krug, 35 Penn. 349.

<sup>4</sup> Nelson v. Campbell, 23 Penn. 156.

<sup>5</sup> Tibbetts v. Moore, 23 Cal. 208.

<sup>6</sup> Dickson v. Corbett, 11 Nev. 277.

<sup>7</sup> Oster v. Rabeneau, 46 Mo. 595.

<sup>8</sup> Tinsley v. Boykin, 46 Tex. 592.

<sup>9</sup> Engleman v. Graves, 47 Mo. 348.

But where a court on appeal may order an inferior tribunal to correct its judgment, and a judgment is given in favor of a material-man on more than one acre of land, which was the limit by law, the lien judgment is not for that reason void, as the appellate court will direct the lower court to so modify its judgment as to give the plaintiff his lien on the one acre alone. This can be accomplished also by a stipulation of the parties defining the acre, and a remitter by the plaintiff of all over and above that amount.<sup>1</sup>

§ 389 *a*. **Correction of.** — A misdescription may be corrected within the time allowed for filing notice of lien.<sup>2</sup> A misdescription of the premises upon which work and labor are done in the erection of a building, in the written contract of the parties, will not prevent the laborer from having his lien upon the premises which are truly described in the petition, and upon which the work was actually done.<sup>3</sup> A description as "part of lot \* " may be sufficient in a notice of lien, but the complaint following the same words would be insufficient; the latter should have rendered the description of the notice more definite.<sup>4</sup> Where a notice failed to disclose the county and State in which the land was located, but the complaint showed the county, it was held sufficient. If a notice is not so defective but that averments and proof can render it certain, such averments and proof will cure its indefiniteness. But if the notice affords no clue to a more perfect description it cannot be cured.<sup>5</sup> Where a claim of lien sufficiently describes the entire building charged, but the complaint only names part of the land on which it rests, the court should direct an amendment of the complaint to conform to the proofs, and a decree for sale only of the part of the building on the land described is wrong.<sup>6</sup>

§ 390. **Who may take Advantage of Insufficient Description.** — Any such insufficiency in the notice may be taken advantage of by the owner, purchasers, or subsequent encumbrancers.<sup>7</sup> But a subsequent mortgagee cannot object that the premises are not so described in the liens as to pass title under a sale, although he may have redeemed the premises from a sale under a judgment on the lien. If from insufficient description the purchaser gets no title, the mortgagee has his remedy in ejectment.<sup>8</sup>

<sup>1</sup> McCoy v. Quick, 30 Wis. 521.

<sup>2</sup> Gray v. Stevenson, 50 Iowa, 173.

<sup>3</sup> Clark v. Manning, 90 Ill. 380.

<sup>4</sup> City of Crawfordsville v. Barr, 65 Ind. 367.

<sup>5</sup> [White v. Stanton, 111 Ind. 540, 543.]

<sup>6</sup> [Willamette, &c. Co. v. Kremer, 94 Cal. 205, 211.]

<sup>7</sup> Knabb's Appeal, 10 Penn. 186.

<sup>8</sup> Gamble v. Voll, 15 Cal. 509.



§ 391. **When to be Made.**<sup>1</sup>—Objection to the notice or complaint on the ground of insufficient description should be made either before or at the trial of the cause, and not on appeal.<sup>2</sup> Every intendment after verdict will be made in its support. Thus, where the registry must contain a specification of “the locality of the building and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same,” after a verdict, a claim was considered good which stated that the house and lot was “on the north side of Lombard Street, west of Ninth Street, adjoining S.S.’s lot, on the east,” without mentioning the number of stories of the house.<sup>3</sup> So, a notice addressed in terms to the clerk of the “city and county of New York,” and stating that the building is situate in “85th Street, between 4th and 5th Avenues,” it was said, although it may be deemed to lack precision, and to require a reference to the address to the clerk of the county to make it plain that the building is within the county, yet this reference, together with a knowledge of the act under which it may be read, could leave no doubt on the mind of any one of the true location of the building; and if a notice so loosely given be not approved of, still the spirit and intent of the statute was so far complied with that, after judgment is given, it would not be reversed for that cause.<sup>4</sup> So a court will not decide, on a writ of error, whether the lien claim includes too much land. This is a question of fact to be settled at the trial.<sup>5</sup>

<sup>1</sup> This section was cited with approbation in *McLaughlin v. Reinhart*, 54 Md. 78, 81.

<sup>2</sup> *Caldwell v. Asbury*, 29 Ind. 451.

<sup>3</sup> *Shaw v. Barnes*, 5 Penn. 18.

<sup>4</sup> *Tinker v. Geraghty*, 1 E. D. Smith, 687.

<sup>5</sup> *Derrickson v. Edwards*, 5 Dutch. (N. J.) 468.

## CHAPTER XXXIII.

## PARTIES.

§ 392. **When Action is Joint or Several, etc.** — Mechanics' lien laws do not change the relation of parties to contracts.<sup>1</sup> The parties proper to bring an action on matters arising out of the contract are the appropriate parties to enforce their claim of lien. Where no provision exists in the statute to the contrary, if the action on the former should be by a joinder of two or more individuals, or should be several, the parties to the claim or petition should be therefore joint or several. Accordingly, a *scire facias* upon a mechanics' lien must, like an action of assumpsit, follow the nature of the contract; if one of several persons who ought to join in such *scire facias* brings the action alone, the defendant may take advantage of the error upon the general issue.<sup>2</sup> So, although a *scire facias* to enforce a lien by a material-man must be brought against the owner and contractor, yet a mechanics' lien can be filed by a firm, one of whose members is named as the contractor.<sup>3</sup> Where a contract was made in the name of one partner for the benefit of both, the petition, being governed by the rules of equity, may be in the names of both.<sup>4</sup> When the statute provides for "a joint or several action" by several claimants to enforce the lien, they may, of course, unite, or any of them may file a separate bill upon his own claim against the employer.<sup>5</sup> Several parties, however, cannot, unless authorized by statute, join in a proceeding to enforce a mechanics' lien, if they have not a joint interest in the subject-matter of the suit.<sup>6</sup> As, where the holder of a claim secured by a lien, prior to the commencement of an action against the defendant, assigns a portion of his claim to another person, such assignee is not a necessary party to the action.<sup>7</sup>

<sup>1</sup> Rockwood v. Walcott, 3 Allen (Mass.), 458.

<sup>2</sup> Howard v. M'Kowen, 2 Browne (Penn.), 150.

<sup>3</sup> Chambersburgh M'fg Co. v. Hazelett, 3 Brewst. (Penn.) 98.

<sup>4</sup> Lombard v. Johnson, 76 Ill. 599.

<sup>5</sup> Longest v. Breden, 9 Dana (Ky.), 141; Barber v. Reynolds, 33 Cal. 497; affirmed in Barber v. Reynolds, 44 Cal. 519.

<sup>6</sup> Bush v. Connelly, 33 Ill. 447.

<sup>7</sup> Boyle v. Robbins, 71 N. C. 130.

So, where persons were partners, and as such contracted to build a house, and upon a settlement a note was given to one of the partners for a certain portion of the price, and to the other two for the residue, the interest of the one who received the note to himself alone thereby became severed from the other two, and they could not, therefore, join in a proceeding to enforce their mechanics' lien, but had to proceed separately, according to their respective rights, as fixed upon the settlement.<sup>1</sup> In regard to defendants it has been decided that on a joint and several contract of two or more parties with a mechanic that he should build them a house, if one is alone made defendant it is sufficient.<sup>2</sup> If a mechanic, in his claim, states the name of the person by whom he was employed, and it turns out that such person was a member of a firm and employed him on behalf of the firm, the mechanic, in an action to enforce the lien, may and should make all the members of the firm defendants, notwithstanding the name only of the one by whom he was employed appears in the claim filed with the recorder.<sup>3</sup> A material-man may join the owner and contractor as defendants, claiming in one count under a contract with the owner, and in another count seeking to subject the balance due the contractor under a contract between him and the owner.<sup>4</sup> A lien against co-partners is not defective because it shows that the original charge was made against one of them alone, when it appears that the plaintiff did not know at the time of the first charge that the other tenant was interested in the building.<sup>5</sup> Where a foreclosure suit is brought against A. & B., as tenants in common of the property charged, they are liable, if at all, jointly, and a money judgment against one only is error.<sup>6</sup> Where the owners of contiguous lots jointly contract for a building thereon, a material-man may sue them jointly, and may also properly join as defendants other material-men who had filed separate liens.<sup>7</sup> The defendant's former partners are not necessary parties defendant in an action to enforce a lien against defendant's interest, and proof that other persons are equitable owners will not defeat the action. "Defendant was the 'owner' of the entire legal title, and the 'owner' in law and equity to the extent of his interest in the partnership; and plaintiff had the right to enforce his

<sup>1</sup> Bush v. Connelly, 33 Ill. 447.

<sup>2</sup> Putnam v. Ross, 55 Mo. 118; Hassett v. Rust, 64 Mo. 325.

<sup>3</sup> McDonald v. Backus, 45 Cal. 262.

<sup>4</sup> [Trammell v. Hudmon, 86 Ala. 472; see § 397.]

<sup>5</sup> [West Coast Lumber Co. v. Apfield, 86 Cal. 335.]

<sup>6</sup> [Lowe v. Turner, 2 Idaho, 107, 110.]

<sup>7</sup> [Treat Lumber Co. v. Warner, 60 Wis 133, 136.]

claim against such interest if he was satisfied to do so.<sup>1</sup> Although we think it would have been better practice to have made the other persons alleged to have been partners parties defendant, we are unable to see that defendant was deprived of any material defence by the action of the court in this connection, and consequently we must hold that the court did not err in striking out the portion of the answer under consideration."<sup>2</sup> "The court, in its decree, should have limited plaintiff's lien to defendant's interest in the property, and only such interest should have been ordered sold to satisfy the judgment." Non-joinder of defendants may, in some States, be waived, as at common law, by not making the objection at the proper stage of the trial, and in the appropriate manner.<sup>3</sup> If A. and B. are tenants in common, and both authorized the improvement, A. being sued alone has a right to demand that B. be made a party.<sup>4</sup>

§ 393. **Survivorship.** — When the action is joint, as in case of partners, and one die, the claims of the firm belong to the survivor, and suit must be brought by him.<sup>5</sup> Where the parties, though not general partners, yet jointly do certain work for their common benefit and account, and one die, the petition should be prosecuted by the survivor.<sup>6</sup> If there be no one jointly interested with a mechanic, to whom the action would survive, and he die before the work is completed or lien taken, the executor may finish it, and take the lien for the whole amount.<sup>7</sup> In some jurisdictions statutes have been passed to prevent the abatement of the proceedings upon the lien claim by the death of the builder or owner, by extending the remedy to executors or administrators; in which case "the executors and administrators" named are those of the owner at the time the lien is filed, and not of a former owner when the contract is made or the work done.<sup>8</sup> If no special statutory provision be made, in a proceeding to enforce the lien on the realty of the decedent, the administrator is a necessary party, as the personal estate, in the event of recovery, is liable primarily<sup>9</sup> to the payment of the

<sup>1</sup> [Garret v. Stevenson, 3 Gillman, 280; Miller v. Faulk, 47 Mo. 264; Mississippi Planing Mill v. Presbyterian Church, 54 Mo. 525; Spare v. Walz, 15 Phila. 263; Smith v. Johnson, 2 McArthur, 483; Sill's Appeal, 1 Grant's Cas. 235; Anderson v. Dillave, 47 N. Y. 678; Jones v. Shawhan, 4 Watts & S. 262; Chambers v. Benoist, 25 Mo. App. 523; Phil. Mech. Liens, sec. 81.]

<sup>2</sup> [Rosina v. Trowbridge, 20 Nev. 105, 115, 121.]

<sup>3</sup> Harbeck v. Southwell, 18 Wis. 418.

<sup>4</sup> [Snodgrass v. Holland, 6 Colo. 596.]

<sup>5</sup> Davis v. Church, 1 Watts & S. 240.

<sup>6</sup> Rockwood v. Walcott, 3 Allen (Mass.), 458.

<sup>7</sup> Horton v. Carlisle, 2 Disney (Ohio), 184.

<sup>8</sup> Robbins v. Bunn, 34 N. J. L. 322.

<sup>9</sup> Taylor v. Taylor, 3 Bradf. (N. Y.) 54.

judgment, the lien being but an additional security, to which the mechanic can resort for the payment of his debt. The heirs, having a direct interest in the land, are also necessary parties to the suit, and are properly joined with the administrator.<sup>1</sup> But where the proceedings were against "the original debtor, and against all and every person owning or possessing the property," and no provision was made for reviving them, the suit should be against the heirs who had taken the estate, and not against his administrator, who is in no sense the owner of the property.<sup>2</sup> When the title of the premises is in the ancestor at the time of his decease, the heirs should be made parties. But where the owner of real estate, upon which there was a mechanic's lien, sold the property, and took a mortgage back to secure the purchase-money, after which he died, it is not necessary to make his heirs, but only his administrator, party defendant to a proceeding to enforce the mechanics' lien, because the mortgage debt and security, being personal property, passed to his personal representatives.<sup>3</sup> Where the lien is on an estate for years and the owner dies, his administrators are necessary parties to a foreclosure.<sup>4</sup> The jury have nothing to do with the question whether they are rightfully made parties or not.<sup>5</sup> Where a corporation, with whom a contract was made to erect a building, ceases to exist, as a church, and it becomes disorganized, it is not necessary to make such body a defendant on petition to establish a mechanics' lien.<sup>6</sup> Where one of two partners dies before suit and action is brought against the survivor he may defend for the partnership, and it is not error to refuse to continue the case, and make the executor of the deceased partner a party, no relief being sought against the estate of the deceased.<sup>7</sup>

§ 394. **Fiduciary Relations.** — Where parties stand in a fiduciary relation to each other, as principal and agent, trustee and *cestui que trust*, and the like, the ordinary rules directing who are the proper parties for the enforcement of contracts will be found generally to apply in proceedings under the lien laws. Suit to enforce a lien cannot be maintained against an agent or trustee without joining the principal or beneficiaries, although

<sup>1</sup> *Guerrant v. Dawson*, 34 Miss. 149; *Mix v. Ely*, 2 Greene (Iowa), 513.

<sup>2</sup> *Belcher v. Schaumburg*, 18 Mo. 189.

<sup>3</sup> *Shields v. Keys*, 24 Iowa, 298. In the absence of administration, the heirs of a deceased owner may be made parties defendant. *Simonds v. Buford*, 18 Ind. 176.

<sup>4</sup> *Brown v. Zeiss*, 59 How. Pr. (N. Y.) 345.

<sup>5</sup> *Van Billiard v. Nace*, 1 Grant Cas. (Penn.) 233.

<sup>6</sup> *Jennings v. Hinkle*, 81 Jll. 183.

<sup>7</sup> [*West Coast Lumber Co. v. Apfield*, 86 Cal. 335.]

the contract under which the lien arises was made with the agent or trustee for the principal or *cestui*, and not directly by the latter.<sup>1</sup> In a proceeding to enforce a mechanics' lien, both the trustee and *cestui que trust* should be made parties, and a failure to commence proceedings against the *cestui que trust* until after the expiration of the time limited by the statute for the commencement of proceedings will have the effect of postponing the lien of the petitioner to that of the *cestui que trust*. Making the trustee named in the deed of trust a party cannot affect the rights of his *cestui que trust*.<sup>2</sup> In a suit to enforce a lien against trust property the trustee is a necessary party as well as the *cestui*,<sup>3</sup> but if the latter allows a decree to pass on the merits without demanding that the trustee be made a party, the *cestui* and those claiming under him will be bound by the decree.<sup>4</sup> It will not be enough to make the *cestui* a party without the trustee. Both are necessary parties when the property is subject to a trust.<sup>5</sup> If the trustee and beneficiary in a prior deed of trust are not made parties, the purchaser at a sale on the mechanics' lien will only acquire the equity of redemption.<sup>6</sup> Where trustees "to receive and pay over profits above necessary expenses" contract for repairs, and a lien suit is brought against them, the *cestui* is not a necessary party.<sup>7</sup> So, the principal and not the agent should be sued;<sup>8</sup> as where a lien is sought to be established against a church, the church, if incorporated, should be sued by its corporate name; and, if not, the individual members of the church collectively.<sup>9</sup> Again, a county erected a building; the action would be properly brought against the county, and not against the controllers of public schools, officers of the county for school purposes.<sup>10</sup> But, where a person does business as "H., agent," for another, and under that name furnished materials, he may file a lien upon the premises and bring a petition for the foreclosure of the lien under that designation.<sup>11</sup> Where the law only gives a lien against the legal interest or estate, the owner of the legal title

<sup>1</sup> [Roman v. Thorn, 83 Ala. 443.]

<sup>2</sup> Bayard v. McGraw, 1 Bradw. (Ill.) 134; Clark v. Manning, 4 Bradw. (Ill.) 649; Phœnix Mut. Ins. Co. v. Batchen, 6 Bradw. (Ill.) 621.

<sup>3</sup> [Bennitt v. Wilmington S. M. Co., 119 Ill. 9; 18 Bradw. 17.]

<sup>4</sup> [Id.]

<sup>5</sup> [Columbia B. & L. Ass. v. Taylor, 25 Ill. App. 429, 432; citing Phillips, § 394; Bannon v. Thayer, 24 Ill. App. 428.]

<sup>6</sup> [Coe v. Ritter, 86 Mo. 278, 284.]

<sup>7</sup> [Cheatman v. Rowland, 92 N. C. 340, 343.]

<sup>8</sup> Keller v. Tracy, 11 Iowa, 530; Hooper v. Flood, 54 Cal. 218.

<sup>9</sup> Keller v. Tracy, 11 Iowa, 530.

<sup>10</sup> Williams v. Controllers, 18 Penn. 275.

<sup>11</sup> Hooker v. Bartholomew, 42 Conn. 95.

is a necessary party.<sup>1</sup> A statute provided that the suit of the mechanic "should be brought against the builder and the owner;" a party in possession made a contract for the erection of the house, with money to be furnished by the owner, — the owner was a necessary party.<sup>2</sup> Although in one case, where the law required "the parties in the contract to be joined in the suit," and the trustees of a church who made the contract were joined, it was sufficient, without making the church corporation a party defendant.<sup>3</sup> A decree was sustained against the L. company although the legal title was in H. L. as trustee, and he was not made a party except as a member of the defendant company.<sup>4</sup>

§ 394 *a*. **Husband and Wife.** — In cases of husband and wife, a mechanics' lien filed against the husband alone, as owner, and a contractor, but not referring to the wife or making her a party to the record, is not a lien against her estate. To be a lien against a married woman, the claim should be filed against the wife. The divestiture of a wife's title under the lien must depend on the record. Proof, after the sale, that she had consented to the contract under which the claim was filed is not allowable. Neither can a sheriff or other officer in such case advertise that he was selling the wife's interest. To hold otherwise would unsettle the whole doctrine of record liens and notice, and leave the question of lien or no lien to depend upon the proof of contracts *in pais*.<sup>5</sup> So, in a proceeding to enforce a lien against an estate by the curtesy, the lien cannot affect the married woman's rights, nor is she a necessary party.<sup>6</sup> It is no objection to the enforcement of a mechanics' lien on community property against the husband's interest, that the heirs of the wife, who died during the suit, were not made parties. The fact that equities may arise in the future affords no reason why the husband's interest should not be sold to satisfy the lien.<sup>7</sup> But a married woman, it would seem, has such an interest in a homestead as to make her a proper party in a suit to foreclose the lien. So if she has the exclusive possession under a decree for alimony.<sup>8</sup> If a husband employ a mechanic to build a house, representing himself as the owner of the equitable title, and his wife was aware of the belief upon which the mechanic was acting, and concealed from him the fact of

<sup>1</sup> Peabody v. East M. S. in Lynn, 5 Allen (Mass.), 540.

<sup>2</sup> Babbitt v. Condon, 3 Dutch. (N. J.)

154.

<sup>3</sup> Miller v. Faulk, 47 Mo. 262.

<sup>4</sup> [Lehman v. Clark, 33 Ill. App. 33.]

<sup>5</sup> Finley's Appeal, 67 Penn. 453.

<sup>6</sup> Schnell v. Clements, 73 Ill. 613.

<sup>7</sup> [Pool v. Wedemeyer, 56 Tex. 287.]

<sup>8</sup> Weston v. Weston, 46 Wis. 130.

her title, she would be estopped, in a suit to enforce the lien, to deny that the title was in her husband. Still, in such case, the wife would be a proper party defendant with her husband in a suit to enforce the lien. But in such case the judgment against the wife should be simply *in rem*, and not against her personally.<sup>1</sup> In those States where a married woman's property is secured to her own use by statute, on a *scire facias* filed against her as owner, it is proper, though not essential, to join the husband as defendant.<sup>2</sup> But, under a statute which requires that "when a married woman is a party, her husband must be joined with her in all actions," etc.; an action under the mechanics' lien law is no exception to this rule.<sup>3</sup> A mere technical omission to join the husband as a defendant would be cured by a plea in bar, trial and verdict.<sup>4</sup>

§ 395. **Rights of persons not Parties.**—Parties and their privies are estopped from litigating of the lien when once established.<sup>5</sup> Accordingly, a purchaser under an execution issued in pursuance of a judgment on mechanics' lien law acquires the title as against all parties before the court;<sup>6</sup> but persons not parties to the proceedings will not be affected by them,<sup>7</sup> and may contest the validity of a sale made under a decree foreclosing the lien.<sup>8</sup> A suit to enforce a mechanics' lien is not a proceeding *in rem* in any such sense as to be binding on any one not made a party. A decree therein cannot affect the interest of one not a party to the suit.<sup>9</sup> As where the contractor alone, and not the owner of a building, is made a party.<sup>10</sup> So if trustees, *cestuis que trust*, and others interested in the property are omitted, they may object, in a suit upon the title under the lien, to the regularity of the proceedings,<sup>11</sup> and make use of the same defences as in the proceedings on the lien if they had been joined as parties.<sup>12</sup> The failure to make a junior encumbrancer a party to a proceeding to foreclose the lien does not preclude the mechanic from enforcing it as a prior lien. But in such case, none of the rights of the encumbrancer are affected.<sup>13</sup> A statute giving "a lien to any person performing labor about bogs," etc., is not invalid,

<sup>1</sup> Peck v. Hensley, 21 Ind. 344.

<sup>2</sup> Whitney v. Joslin, 108 Mass. 103.

<sup>3</sup> Fink v. Hanegan, 51 Mo. 280.

<sup>4</sup> Hutchinson v. Preston, 2 Pittsb. 303.

<sup>5</sup> State of Iowa v. Eads, 15 Iowa, 114.

<sup>6</sup> Lewis v. Rose, 82 Ill. 574.

<sup>7</sup> Stiegleman v. McBride, 17 Ill. 300; Williams v. Chapman, Id. 423; Clarke v. Ratcliffe, 8 Miss. 162; Heim v. Vogel, 69 Mo. 535.

<sup>8</sup> Raymond v. Ewing, 26 Ill. 329;

Johnson v. Pike, 35 Me. 291.

<sup>9</sup> Dunphy v. Riddle, 86 Ill. 22.

<sup>10</sup> Rogers v. Klingler, 3 Whart. (Penn.) 332.

<sup>11</sup> Hauser v. Hoffman, 32 Mo. 334.

<sup>12</sup> Christine v. Manderson, 2 Penn. 363.

<sup>13</sup> Evans v. Tripp, 35 Iowa, 371; Jones v. Hartsock, 42 Iowa, 147.



although it does not provide for the owner of the property being made a party, as he can subsequently replevy the articles seized, or bring an action against the officer seizing them on execution at the suit of the lien-holder.<sup>1</sup> So a mechanics' lien upon the interest of those having only an equitable title in lands is not affected by proceedings to extinguish such title, without notice to the lienor and joinder in such proceedings.<sup>2</sup> A decree in a case to which a laborer was not a party will be no adjudication that the lien of the complainant was superior to that of the laborer.<sup>3</sup> But in another case, where the lien of a mechanic for the erection of a building only extended to and bound the actual interest in the land of the person with whom he contracted, it was decided that such person was the only proper party defendant to a proceeding to enforce the lien; and that in such a proceeding the rights of third parties to the land on which the building was erected could not be inquired into, and it would therefore be error to make such third parties defendants to the petition.<sup>4</sup> Indeed, unless authority is given by statute, a prior mortgagee cannot without his consent be made a party to foreclose a lien and the entire estate sold; his rights cannot be affected by such proceedings.<sup>5</sup> But, where a lien law authorizes the service of notice on encumbrancers, and judgment is to be rendered as to the rights and equities of the several parties among themselves and as against any owner, as shall be just, a fraudulent transferee may be made a party, and the validity of his title adjudicated in the lien proceedings.<sup>6</sup> So, where a statute provides that "all parties in interest have a right on their own motion to become parties to the proceedings," it was held to follow that they should be made parties at the instance of the petitioner if known, or disclosed during the proceedings, and a decree without them before the court was considered erroneous.<sup>7</sup> If an infant co-owner is not made a party by appointment and appearance of a guardian *ad litem* he is unaffected by the proceedings.<sup>8</sup> In a suit to enforce a mechanics' lien, all persons claiming liens on the property sought to be subjected must be made parties. And if another suit to enforce a mechanics' lien on the same property be already pending, and the petitioner in such first suit be not made a party defendant in the second

<sup>1</sup> *Munger v. Leuroot*, 32 Wis. 541; *Winslow v. Urquhart*, 39 Wis. 260.

<sup>2</sup> *Hallahan v. Herbert*, 11 Abb. Pr. N. S. 326.

<sup>3</sup> *Tarrer v. Fleming*, 53 Ga. 297.

<sup>4</sup> *Laud v. Muirhead*, 31 Miss. 89.

<sup>5</sup> *Smith v. Shaffer*, 46 Md. 573.

<sup>6</sup> *Gross v. Daly*, 5 Daly (N. Y.), 540.

<sup>7</sup> *Race v. Sullivan*, 1 Bradw. (Ill.) 94.

<sup>8</sup> [*Brown v. Downing*, 137 Penn. 569, 573.]

suit, then his rights are unaffected by a sale under judgment obtained in the latter suit.<sup>1</sup> Unless expressly required by law it is not necessary to make all those interested in the property parties to the suit, but the interest of such as are not parties will not be affected.<sup>2</sup> One holding a prior mortgage and not made a party is unaffected. "When they made their contract with the owner of the property the mortgage under which the plaintiff claims was of record. In order to charge the interest of the beneficiary under that mortgage, they were bound to make him and also the trustee in the deed of trust parties to their proceedings to establish their mechanics' lien; this was necessary in order to establish the lien as against them, and conclude their rights, and failing in this, they established their lien only against the equity of redemption of the owner, and, under the sale to enforce the same they acquired only this equity of redemption."<sup>3</sup> In an action to foreclose, all lien-holders and incumbrancers *should* be made parties, and if one is omitted he may come in at any time before final judgment, with an answer in the nature of a cross-petition, setting forth his lien and asking to have it foreclosed, and his right to a judgment will not be defeated by the dismissal or withdrawal of the plaintiff.<sup>4</sup>

§ 396. **Parties when Building is sold.**—There is some contrariety of decision under the various statutes, as to who is to be made party defendant where the land and premises have been sold during the building. Thus, it has been held, under the Pennsylvania statute, which provides that the claim shall set forth "the name of the owner or reputed owner of the building, and also the contractor," etc., that a mechanic who files his lien against the proper person when the work was commenced is not bound to inquire further or take notice of any subsequent conveyance of the property.<sup>5</sup> Again, one who buys real estate subsequently to the erection of a house thereon is not a necessary party to a suit brought by the builder to enforce his lien.<sup>6</sup> On the other hand, it has been decided that where, during the progress of the work, a transfer of the property may be made to a purchaser, in which case, if nothing in the statute exhibit a contrary intent, and the proceeding is *in rem*, having for its object

<sup>1</sup> [Buntyn v. Shippers' Compress Co., 63 Miss. 94.]

<sup>2</sup> [Morgan v. Chicago, &c. R. Co., 76 Mo. 161.]

<sup>3</sup> [Mo. Fire Clay Works v. Ellison, 30 Mo. App. 67, 75; Crandall v. Cooper, 62 Mo. 478; Coe v. Ritter, 86 Mo. 285.]

<sup>4</sup> [Johnson v. Keeler, 46 Kan. 304; citing Venable v. Dutch, 37 Kan. 515; Worrall v. Wade's Heirs, 17 Iowa, 96.]

<sup>5</sup> Fourth Ave. Bapt. Ch. v. Schreiner, 88 Penn. 124.

<sup>6</sup> Colley v. Doughty, 62 Me. 501.

simply the enforcement of the lien and not a personal judgment on the contract for building, it is not necessary to make the owner who has parted with his interest in the premises a party to a bill to foreclose the lien.<sup>1</sup> He is not a necessary party.<sup>2</sup> Again, it has been held that a person who has assigned all his interest in premises upon which there is a lien, is not a necessary party to a petition for foreclosure.<sup>3</sup> But the purchaser of property, before the institution of a suit to enforce the lien, is a necessary party to a *scire facias*, under a law providing that no execution should issue "unless a *scire facias* shall first have issued and been served upon the owner or possessor of such property." The law repudiates the idea of condemning the property of one man to pay the debt of another, without giving him an opportunity in court, upon due service of process, of showing that the claim ought not to be asserted against his property. This is particularly the case in a proceeding *in rem*, where there can be no general judgment against the original debtor. If he is absent or insolvent, or is indifferent about protecting his vendee, he may have neither motive nor interest to defend the suit, or may even be in collusion with the plaintiff; and it is therefore most important that the real owner whose property it is proposed to condemn to pay another's debt should at least have an opportunity to defend. So if, in such case, suit be brought in the ordinary form against the vendor, an execution could not issue against the property unless a *scire facias* shall have first issued and been served upon such purchaser.<sup>4</sup> The same conclusion was substantially arrived at in another case, where the title to property upon which a lien was claimed was changed between the time of making the contract or doing the work and the time of filing the lien: the person owning the property when the lien was filed was decided to be the proper one to be made a party, as owner.<sup>5</sup> One who has become owner since a mechanics' lien attached is not a necessary party to a suit to enforce the lien.<sup>6</sup> But in Minnesota a grantee of the owner buying between the attachment of the lien and suit to enforce it is a necessary party to the foreclosure suit.<sup>7</sup> In Colorado it is said that if the owner has conveyed the property to B. for the purpose of paying debts and incumbrances, it is sufficient, *perhaps*, to make B. the defend-

<sup>1</sup> *Rose v. Persse*, 29 Conn. 256.

<sup>2</sup> *Kellenberger v. Boyer*, 37 Ind. 188.

<sup>3</sup> *McCormick v. Lawton*, 3 Neb. 449.

<sup>4</sup> *Clark v. Brown*, 25 Mo. 559.

<sup>5</sup> *Edwards v. Derrickson*, 4 Dutch.

(N. J.) 39; affirmed in 5 Dutch. (N. J.) 468; *Robins v. Bunn*, 34 N. J. L. 322.

<sup>6</sup> [*Koenig v. Boehme*, 14 Mo. App. 593.]

<sup>7</sup> [*Burbank v. Wright*, 44 Minn. 544.]

ant instead of the original owner.<sup>1</sup> So where T. was owner when R. did the work, R. may enforce his lien against T. as sole defendant, without joining those who were T.'s partners at the time the building contract was made.<sup>2</sup>

§ 396 *a*. **Death of the Owner.** — Where the owner who incurred the debt is dead the lien may be filed against the *estate* of the deceased owner. The administrator is the proper party defendant. The heirs need not be made parties.<sup>3</sup>

§ 397. **Proper Parties when Suit is by Sub-contractor, &c.** — So far the subject has been considered with reference to the immediate parties to the contract and their legal representatives or successors in interest. Under some of the systems adopted, by which sub-contractors and others in a like situation are secured liens, or the foreclosure of the lien is enforced by an equitable proceeding, in which all interested in any manner in the property may be joined, it has been found necessary, in order to enforce these provisions, that persons should be made parties to the proceedings who were not parties to the contract for labor and materials, and who would not under common-law principles be appropriately joined in the action. Thus, no privity of contract exists between a sub-contractor and an owner; but it is evident that a lien should not be established against his property, and it be sold for its payment, without an opportunity being accorded to him to make defence. Besides, it is all-important that the contractor to whom the credit was given should be a party to an action for materials furnished him, as he alone can be presumed to know about the correctness of the claim made, or the proper defence to make if any exist. The owner of the property may know nothing of either, and would not therefore be in a condition to defend his property against an illegal demand. He may even have paid the contractor in full, according to the terms of the contract, before notice of any claim by a sub-contractor, which in many States would be a complete bar to the lien.<sup>4</sup> Moreover, a judgment against the owner in an action by the sub-contractor would not be conclusive on the intermediate contractor, and the owner would be driven to another action against him to recover the amount he has been obliged to pay, and might in such action recover less than the

<sup>1</sup> [Getman Nat. Bank v. Elwood, 16 Colo. 244, 247.]

<sup>2</sup> [Rosina v. Trowbridge, 20 Nev. 105, 110, 111.]

<sup>3</sup> [Cummings v. Halsted, 26 Minn. 151; Welch v. McGrath, 59 Iowa, 519, 524

*et seq.* Robbins v. Burns, 34 N. J. L., *contra*, because N. J. statute requires name of owner, Iowa statute does not.]

<sup>4</sup> Sullivan v. Decker, 1 E. D. Smith, 699.

amount of the judgment against himself. A judgment, however, against the intermediate contractor, for materials furnished, would be conclusive as to the amount against the owner, unless he could show fraud or collusion. And therefore, under the following statute, "when the complaint does not allege that the labor was performed or the materials furnished pursuant to an agreement with the defendant, but shall allege that the labor was performed or the materials furnished pursuant to an agreement with some contractor therein named, which contractor was employed by said defendant, and had served a notice in writing upon the defendant or his agent, to the effect that he, the plaintiff, was or had been employed by the said contractor to perform labor thereon, etc., and relied upon him, the defendant, or upon such lands for his pay; then the filing of such complaint shall constitute and be a lien in favor of the plaintiff to the amount the defendant was indebted to the said contractor . . . and, when a lien shall be acquired under this section, it shall be a bar to any action by the said contractor for the recovery of his claim for moneys due him from said defendant, to the amount of the lien decided in favor of the plaintiff," and which did not provide who should be parties to the action, — it was held that the contractor as well as the owner was a necessary party.<sup>1</sup> Again, where a claim was filed by a sub-contractor, it was decided to be proper practice to make the contractor as well as the owner of the building a defendant in the petition, so that the court might adjust all the equities, where the suit was in equity, although the statute did not expressly authorize it.<sup>2</sup> Similar views were expressed in another State, under a statute which gave a lien to a sub-contractor, on notice to the owner; the contractor was considered a necessary party, although no judgment could be rendered against him.<sup>3</sup> And, if the proceedings were dismissed as to him, it was deemed an abandonment of the suit, as no party was on the record to defend the suit, and the cause could not proceed against the owner of the building alone. The contractor was the only person who could contest the validity of the demand. It was likened to a proceeding by garnishment; if the creditor should dismiss his suit against the debtor, he could not afterwards proceed against the garnishee.<sup>4</sup> So, under a law providing for the enforcement of the lien "by *scire facias*

<sup>1</sup> *Emmet v. Rotary Mill Co.*, 2 Minn. 286.

<sup>2</sup> *Carney v. La Crosse & M. R. R. Co.*, 15 Wis. 503.

<sup>3</sup> *Clark v. Brown*, 22 Mo. 140; *Walkenhorst v. Coste*, 33 Mo. 401.

<sup>4</sup> *Wibbing v. Powers*, 25 Mo. 599.

against the debtor and owner," both the owner and the builder should be joined as defendants.<sup>1</sup> Again, where it is enacted that "in all cases where a lien is filed by any person other than the contractor, it shall be the duty of the contractor to defend," etc., the original contractor ought to be brought before the court as a co-defendant. But if he be not, the judgment will not for this omission be irregular or void. The objection of non-joinder should have been taken by demurrer or plea; and, when not, the owner will be presumed to have waived it.<sup>2</sup> In a sub-contractor's suit against the owner, the contractor must be made a party, and if he is not, the owner may make a counterclaim for damages by the omission.<sup>3</sup> It is needful to make the original contractor a party, because the state of accounts between the owner and contractor and between the latter and the sub-contractor must be adjudicated before the lien can be established.<sup>4</sup> So in Iowa a sub-contractor must make the contractor a party.<sup>5</sup> The claim must be adjudicated between them before a lien can be established. The owner, in case a lien is given, has recourse over against the contractor, and he is entitled to an adjudicated claim against such contractor. In California it is held proper for a material-man or laborer to make both the contractor and owner defendants, in one action uniting a personal action against the contractor with a foreclosure of lien against the owner.<sup>6</sup> But the contractor is not a *necessary* in a suit by a material-man against the owner, and although made a party by amendment after the statutory time for action has expired, the owner is not prejudiced and cannot complain.<sup>7</sup> So the owner on appeal cannot complain that the contractor was not made a co-defendant below, when he did not ask for an order to have him joined.<sup>8</sup> In an action to enforce a mechanics' lien by a sub-contractor against the contractor and the owner, the non-joinder of other original contractors is not sufficient ground for sustaining a plea in abatement, one contractor having been made a party defendant.<sup>9</sup> A trustee in a conveyance, subject to the lien, is not an essential party in a sub-contractor's suit.<sup>10</sup> A mortgagee is not

<sup>1</sup> *Sinnickson v. Lynch*, 1 Dutch. (N.J.) 38; *Murdock v. Hillyer*, 45 Mo. App. 287.]

<sup>2</sup> *Hortskotte v. Menier*, 50 Mo. 158.

<sup>3</sup> [*Tracy v. Kerr*, 47 Kan. 656.]

<sup>4</sup> [*Kerns v. Flynn*, 51 Mich. 573.]

<sup>5</sup> [*Vreeland v. Ellsworth*, 71 Iowa, 347, 349; *N. W. Pavement Co. v. Seminary*, 43 Minn. 449; *Lumber Co. v. Hotel Co.*, 109 N. C. 658; *Lombard v. Trustees*, 73 Ga. 322; *Bombeck v. Devorss*, 19 Mo. App.

38; *Murdock v. Hillyer*, 45 Mo. App. 287.]

<sup>6</sup> [*Giant Powder Co. v. Flume Co.*, 78 Cal. 193.]

<sup>7</sup> [*Green v. Clifford*, 94 Cal. 49.]

<sup>8</sup> [*Yancy v. Morton*, 94 Cal. 558.]

<sup>9</sup> [*Foster v. Wulfling*, 20 Mo. App. 85; *Fruin v. Furniture Co.*, 20 Mo. App. 313.]

<sup>10</sup> [*Lumber Co. v. Hotel Co.*, 109 N. C. 658.]

an "owner" within the meaning of the mechanics' lien law, and is not entitled to a notice of a suit upon a lien claim. The owner, under such a statute, of the legal estate is alone to be made a party.<sup>1</sup>

§ 398. **Rule in Pennsylvania.**—In Pennsylvania, where the lien is enforced by *scire facias*, and was to be "against the debtor and owner of the building or their executors or administrators," the term "debtor" was understood to designate the contractor as a necessary party.<sup>2</sup> If the contractor was omitted the error was fatal;<sup>3</sup> although, where there were two contractors, and only one was named, the mistake was held available only on plea in abatement.<sup>4</sup> The owner, likewise, was an indispensable party; but as frequently transfers were made subsequently to the commencement of the building, of which the claimant might have no notice, it was allowed, even under the above-cited act, to bring the *scire facias* against a reputed owner. This manner of proceeding was subsequently expressly provided for by directing the claim to set forth "the names of the owner or reputed owner of the building, and also the contractor," etc. The fact that an owner was not made a party was an objection which availed only the owner and his privies, and not the contractor.<sup>5</sup> A lessee for years, who has made improvements, is deemed an owner to the extent of his interest, and, as such, is a proper party.<sup>6</sup> And where the *scire facias* is to make known to the owner or reputed owner, and "to all such persons as may hold or occupy the said building, that they be and appear before the court," to show cause against the claim, a mortgagee, who becomes such subsequently to the commencement of the building, may come in and make defence.<sup>7</sup>

§ 399. **Parties when Suit is in the Nature of Chancery Proceedings.**—Where a suit to enforce a mechanics' lien is substantially a chancery proceeding, the rules of practice, in respect to necessary parties, will be held to apply;<sup>8</sup> and the defendants should be the owners of the property to be charged.<sup>9</sup> Subsequent purchasers, who buy the estate subject to the lien,<sup>10</sup> and subsequent mortgagees, are necessary parties to foreclose their interests.<sup>11</sup> So, when the remedy provided is in the nature of an equitable

<sup>1</sup> *Tompkins v. Horton*, 25 N. J. Eq. 284.

<sup>2</sup> *Barnes v. Wright*, 2 Whart. (Penn.) 193; *Rogers v. Klingler*, 3 Whart. (Penn.) 335.

<sup>3</sup> *Davis v. Stratton*, 1 Phila. 289.

<sup>4</sup> *Richebaugh v. Dugan*, 7 Penn. St. 394.

<sup>5</sup> *Christine v. Manderson*, 2 Penn. St. 365.

<sup>6</sup> *Anshutz v. McClelland*, 5 Watts (Penn.) 487.

<sup>7</sup> *M'Adam v. Bailly*, 1 Phila. 297.

<sup>8</sup> *McGraw v. Bayard*, 96 Ill. 146.

<sup>9</sup> *Decker v. Myles*, 4 Colo. 558.

<sup>10</sup> *Brown v. Zeiss*, 59 How. Pr. (N. Y.) 345.

<sup>11</sup> *McGraw v. Bayard*, 96 Ill. 146.

proceeding to foreclose the lien, in analogy to the practice upon the foreclosure of a mortgage, with a view to the sale of the fee-simple of the mortgaged premises, it would seem that all persons having a claim to have a lien thereon at the time of the commencement of the suit should be made parties.<sup>1</sup> A decree in such case, for the sale of premises in a suit to enforce a mechanics' lien, has the same and no greater effect upon the rights of purchasers and encumbrancers, prior to the commencement of the suit, than a similar decree would have upon the foreclosure of a mortgage. If such purchasers or encumbrancers be not made parties, they are not bound by the decree or the proceedings thereunder; and, therefore, all persons interested in the premises, prior to suit brought to foreclose a mortgage or enforce a mechanics' lien, whether purchasers, heirs, devisees, remainder-men, reversioners, or encumbrancers, must be made parties, otherwise their rights will not be affected.<sup>2</sup> As where a purchaser contracted for the erection of a house, but previously conveyed the property to a trustee to secure the balance of the purchase-money. The mechanic filed a bill to enforce his lien, making the purchaser alone a party, and obtained a decree, under which the mechanic became the purchaser at the judicial sale. Subsequently the trustee sold the premises under the trust deed, and A. became the purchaser. The sale under the decree did not affect the interests of the trustee or *cestui que trust*, inasmuch as they were not made parties, and the title of A. was superior, claiming under a prior lien to that of the mechanic. All persons interested in the premises should have been made parties to the proceedings to enforce the mechanics' lien.<sup>3</sup> So, where real estate was sold by a sheriff under a decree of foreclosure, and was subsequently sold under a decree foreclosing a mechanics' lien, in which latter suit the purchaser under the first sale was not made a party, the deed of the sheriff under the sale foreclosing the mechanics' lien did not divest or affect the title of the first purchaser.<sup>4</sup> So, where the lien is enforced by filing a bill in chancery, a purchaser of the property after notice of lien, but before the commencement of a suit to enforce the same, is a necessary party to such suit. A sale under a decree to which such purchaser is not a party

<sup>1</sup> Kaylor v. O'Connor, 1 E. D. Smith, 672; North Presbyterian Church v. Jeone, 32 Ill. 214.

<sup>2</sup> Whitney v. Higgins, 10 Cal. 547.

<sup>3</sup> Lomax v. Dore, 45 Ill. 379; Kelly v. Chapman, 13 Ill. 530. A mortgagee

cannot intervene in a suit to enforce a mechanics' lien against the mortgaged property. Van Winkle v. Stow, 23 Cal. 457; *contra*, Walker v. Hauss Hijo, 1 Cal. 183; Hooker v. Kelley, 14 Id. 164.

<sup>4</sup> In Matter of Smith, 4 Nev. 254.



is as to him a nullity.<sup>1</sup> The same rule applies to judgment creditors.<sup>2</sup>

§ 400. **After Suit brought.** — Persons who acquire interests as purchasers or encumbrancers, after suit brought, need not be made parties.<sup>3</sup> So, if it be a proceeding at law, no equity of redemption exists, and subsequent mortgagees need not be made parties;<sup>4</sup> though if made parties, it is not error.<sup>5</sup> But if the fundamental idea of the law is to pursue the lien into whosoever hands the estate passes, subsequent purchasers and encumbrancers should be made parties. The lien would be ineffectual unless their interest is subjected to its payment: and this cannot be accomplished unless they are parties to the proceeding.<sup>6</sup>

§ 401. **Other Mechanics' Lien Claimants.** — Claimants need not, unless directed by statute, make other mechanics' lien claimants parties to the proceeding to enforce their individual liens. Usually, however, provision is made for their becoming parties, in which case they generally have the same rights as if they had filed originally separate petitions for the enforcement of their liens.<sup>7</sup> It is eminently just that the co-lienholder should have notice, and, in some mode, an opportunity to come in and deny the amount, and, if he can, the existence of the alleged lien, by means of which the security he has may be taken from him. He may be able to show that nothing is due to the claimant; or, in cases where sub-contractors claim from the owner, who is only responsible for the amount due the contractor, and where the first in time has priority, that he who is first in time is subordinate in equity. Among sub-contractors and material-men this is especially apparent when the lien-holder who first files his claim is an insolvent contractor, and all others are his unpaid laborers and material-men. Besides, justice to the owner requires that he should not, after being compelled to appropriate the funds in his hands to the payment of the earliest lien, be liable to have such payment impeached by a subsequent claimant, who denies that anything was due on the former. But, notwithstanding these reasons for making other and subsequent lien-holders parties, still it is not necessary to join them, if it appear that the legislature did not contemplate that they should

<sup>1</sup> *Holland v. Jones*, 9 Ind. 495; *Marvin v. Taylor*, 27 Ind. 73. He is not a necessary party under a Missouri statute. *Schoeffer v. Lohman*, 43 Mo. 68.

<sup>2</sup> *McLagan v. Brown*, 11 Ill. 519.

<sup>3</sup> *Whitney v. Higgins*, 10 Cal. 547; *Suydam v. Holden*, 11 Abb. Pr. N. S. 329.

<sup>4</sup> *State of Iowa v. Eads*, 15 Iowa, 114;

[*Kornegay v. Steamboat Co.*, 107 N. C. 115.]

<sup>5</sup> *Shields v. Keys*, 24 Iowa, 298.

<sup>6</sup> *Edwards v. Derrickson*, 4 Dutch. (N. J.) 45.

<sup>7</sup> *Dewing v. Cong. Soc.*, 13 Gray (Mass.), 414; *Whitney v. Higgins*, 10 Cal. 547.

be made parties. The remedy in such case for a subsequent lien-holder who finds alleged liens, if he can aver their illegality, set up a higher equity in his own favor, impeach their amount, or charge fraud or collusion therein to his prejudice, would be to file his complaint in equity, and, upon the general principles of chancery, claim an investigation of their merits and have them set aside or postponed. A similar relation exists among such lien-holders as exists between judgment creditors. Those whose judgments are subsequent were not parties to the suits in which the prior judgments were recovered, and yet their judgments are postponed to the full amount of such prior judgments, without an opportunity to contest the claim on which the latter were recovered, or its amount. If they desire to impeach them, the subsequent judgment creditors must become actors, and go themselves into court with the grounds of such impeachment.<sup>1</sup> Other lienors, subsequent as well as prior, may properly be made parties defendants, for the purpose of having the amounts and priorities of their respective liens established.<sup>2</sup> But in no case is it necessary to make any one a party to a petition to enforce a mechanics' lien, who may have done work on the same building, unless he has an interest therein. If he has been paid for his work, or has no interest in the property, he is not only not a necessary party, but it would be improper to make him a party.<sup>3</sup> Where several actions have been commenced to enforce liens for materials and labor upon the same building, they may be consolidated, and the rights of all the lien claimants may be determined in the findings and judgment.<sup>4</sup> In an action brought to foreclose a mechanics' lien filed under chapter 315, New York Laws of 1878, in which the plaintiff has filed a *lis pendens* with the comptroller, it is not necessary for a lienor made a defendant in such an action, and named as such in the *lis pendens* filed by the plaintiff, to bring thereafter a separate action on his own claim and lien, and file a notice of the pendency thereof with the comptroller.<sup>5</sup>

§ 401 *a*. **General Principles.**—All parties in interest must be before the court<sup>6</sup> if the judgment is to be conclusive against the world upon the property, and not merely upon some particular interest in the property, or if the law requires it. In an action to foreclose a lien all lien-holders and incumbrancers may be made parties, and all the issues in the case may generally be

<sup>1</sup> Kaylor v. O'Connor, 1 E. D. Smith, 672.

<sup>2</sup> [Kenney v. Apgar, 93 N. Y. 539.]

<sup>3</sup> Meeks v. Sims, 84 Ill. 422.

<sup>4</sup> [Allis v. Meadow Springs Distilling Co., 67 Wis. 16.]

<sup>5</sup> [McDermott v. McDonald, 50 N. Y. Super. 153.]

<sup>6</sup> [Pairo v. Bethell, 75 Va. 825.]

tried at once before one jury.<sup>1</sup> But "it is 'only when a complete determination of the controversy cannot be had without the presence of other parties that the court *must* cause them to be brought in.'"<sup>2</sup> That a part of the title to the property is in others than the owners sued will not defeat the lien as against the owner who is sued,<sup>3</sup> except where the law so provides under a provision that "parties to the contract *shall*, and all other persons interested in the controversy or in the property charged *may*, be made parties." One who contracts with the plaintiff as agent of the owner need not be made a party; the "shall" relates to parties between whom a personal judgment is to be rendered.<sup>4</sup> The "parties to the contract" are the parties to that contract which is the subject of the inquiry, and as between whom a personal judgment is to be rendered.<sup>5</sup> Where F. was the contractor and R. a sub-contractor for the brick work, and D. sold the brick to R., it was held that F. was not a necessary party, but that R. was.<sup>6</sup> In Colorado all persons in interest, whether of the property or as lien claimants, are to have notice, but the defendants proper are the owners of the property to be charged.<sup>7</sup> All persons interested in the premises must be made defendants.<sup>8</sup> Holders of a vendor's lien and a mortgage on certain premises are not necessary or indispensable parties to a suit to enforce a mechanics' lien against property on the premises, where complainant does not seek priority over such liens, as they cannot be prejudiced by the suit.<sup>9</sup> If the bill does not make a prior incumbrancer a party, the defendant may demur if he thinks such incumbrancer a necessary party, but he cannot complain of the non-joinder as error on appeal.<sup>10</sup> The objection that the petition does not implead the necessary parties may be raised by demurrer or answer, or at the hearing, and is not lost by putting in an answer after demurring.<sup>11</sup> But it must not be left till the court is ready to give judgment.<sup>12</sup>

<sup>1</sup> [Town Co. v. Morris, 39 Kan. 377.]

<sup>2</sup> [Kornegay v. Steamboat Co., 107 N. C. 115, 117.]

<sup>3</sup> [Brown v. Wright, 25 Mo. App. 54.]

<sup>4</sup> [Whitmeyer v. Dart, 29 Mo. App. 565, 569; Foster v. Wulffing, 20 Id. 87.]

<sup>5</sup> [Downey v. Higgs, 41 Mo. App. 215, 219; Foster v. Wulffing, 20 Mo. App. 87; Whitmeyer v. Dart, 29 Mo. App. 569; Goff v. Papin, 34 Mo. 180; Peters v. Railroad, 24 Mo. 587; Kent v. Railroad, 2 Kernan, 628.]

<sup>6</sup> [Downey v. Higgs, 41 Mo. App. 215, 219.]

<sup>7</sup> [Snodgrass v. Holland, 6 Colo. 596, 599.]

<sup>8</sup> [San Juan, &c. Co. v. Finch, 6 Colo. 215, 223.]

<sup>9</sup> [Case M'fg Co. v. Smith *et al.*, 40 Fed. R. 339.]

<sup>10</sup> [Partones v. Badenoch, 132 Ill. 377.]

<sup>11</sup> [Kerns v. Flynn, 51 Mich. 573.]

<sup>12</sup> [Kornegay v. Steamboat Co., 107 N. C. 115.]

## CHAPTER XXXIV.

## COMPLAINT AND PETITION.

§ 402. **Averments of.** — A complaint or petition by the lien claimant, with a summons to the owner, or other party named therein, to appear and defend, has been adopted in most of the States as the initiatory proceeding in court to enforce the lien.<sup>1</sup> A party, to avail himself of these statutes, must show by his pleading that his case comes within their provisions.<sup>2</sup> The complaint, therefore, should aver all facts necessary to show the statutory right on the part of the claimant to create a lien;<sup>3</sup> and the practice of alleging, in a complaint for lien, the facts which authorize the demand sued for to be decreed a lien upon specific property, and then so declaring it in the decree or judgment, would seem to be correct.<sup>4</sup> If the complaint does not state facts sufficient to constitute a cause of action, no material issue of fact can be joined upon it. An answer denying the facts would not waive the defect; and as in other civil actions, advantage might be taken of it in any subsequent stage of the proceeding.<sup>5</sup> But the rule that the complaint must state a cause of action against *all* who are made defendants, does not apply to a suit for foreclosure of a lien. And in a suit against a married woman's separate estate joining the husband to answer to any interest he may have, the latter's separate demurrer will be overruled.<sup>6</sup> Where the complaint is simply in the ordinary form for work and labor, it is not sufficient;<sup>7</sup> and even in those cases where no direction is given in the statute as to what the declaration should contain, but simply declares that, "in all cases of lien created by this act, the person having a claim filed in accordance with its provisions may proceed to recover it by personal action against the debtor," etc., it must still be adapted

<sup>1</sup> *Spofford v. Huse*, 9 Allen (Mass.), 575.

<sup>2</sup> *Sutherland v. Ryerson*, 24 Ill. 517.

<sup>3</sup> *Foster v. Poillon*, 2 E. D. Smith, 556; *Conkright v. Thomson*, 1 E. D. Smith, 661; [*Chaffin v. McFaddin*, 41 Ark. 42, 43.]

<sup>4</sup> *Mason v. Heyward*, 5 Minn. 74.

<sup>5</sup> *Doughty v. Develin*, 1 E. D. Smith, 625.

<sup>6</sup> [*Scott v. Goldinghorst*, 123 Ind. 268.]

<sup>7</sup> *Foster v. Poillon*, 2 E. D. Smith, 556; *Shaw v. Allen*, 24 Wis. 563.

to the object to be accomplished. The declaration should contain the necessary averments to show not only that a sum of money is due the plaintiff, but that the debt was created by the performance of such labor as is secured by the lien, that the claim was filed within the time limited, a description of the building, and of the premises upon which it is situated. All these facts are usually material, and, when so, must be alleged and proved.<sup>1</sup> Unless the facts essential to the support of the case be alleged in the pleadings, evidence of such omitted facts, or stipulations of facts thereto, cannot be heard, or make a broader case than alleged in the pleadings.<sup>2</sup> Every party in this proceeding, as in others, is bound to prove every substantial allegation made by him. As where the petition set forth and alleged a lien created by a joint contract of two, and the sole contract of one was proved; the debt proven was not the debt alleged, and the claimant was nonsuited.<sup>3</sup> The complaint is subjected to the rules of law governing pleadings in other actions, and, when defective, is fatal, unless allowed to be amended.<sup>4</sup> The complaint of a contractor must allege the filing of a verified statement of lien in the office of the Circuit Court clerk.<sup>5</sup> A complaint showing an insufficient filing of lien is not aided by a supplemental complaint showing a filing after suit.<sup>6</sup> Filing a petition is the beginning of a lien suit, the service of process is only a step in the cause.<sup>7</sup> A copy of the notice must be filed with the complaint.<sup>8</sup> A complaint that refers to the statement of lien as attached thereto makes the facts of the statement a part of the complaint.<sup>9</sup> If there is no averment in the petition that work was done or materials furnished, or that anything is due for work or materials, it is error for the court to grant a lien at the trial.<sup>10</sup> But the complaint need not state the amount of materials furnished, — it is sufficient in this respect if it states the contract price.<sup>11</sup> It has been said that it must be alleged that the materials went into the building;<sup>12</sup> but this is too extensive a rule on one side and too narrow on another. The true rule is that it must be averred that the materials were

<sup>1</sup> *Dewey v. Fifield*, 2 Wis. 73.

<sup>2</sup> *Hicks v. Murray*, 43 Cal. 515.

<sup>3</sup> *Thurston v. Schroeder*, 6 R. I. 272.

<sup>4</sup> *Duffy v. Brady*, 4 Abb. (N. Y.) 432.

<sup>5</sup> [*Boals v. Intrup*, 40 Ill. App. 62.]

<sup>6</sup> [*Meyer v. Berlandi*, 39 Minn. 438.]

<sup>7</sup> [*Sheridan v. Cameron*, 65 Mich.

680.]

<sup>8</sup> [*McCarty v. Burnet*, 84 Ind. 24; *Scott v. Goldinghorst*, 123 Ind. 268. But

see remarks in *Adamson v. Shaner*, 3 Ind. App. 448.]

<sup>9</sup> [*Mortgage Trust Co. v. Sutton*, 46 Kan. 166.]

<sup>10</sup> [*Roberts v. Campbell*, 59 Iowa, 675, 678.]

<sup>11</sup> [*Gunter v. Bennett*, 72 Md. 384.]

<sup>12</sup> [*Hydraulic Press-Brick Co. v. Zepfenfeld*, 9 Mo. App. 595.]

furnished *to be* used on the property sought to be charged. It is not enough to allege that they were furnished and were in fact used on said property.<sup>1</sup> Where materials are furnished to the owner of the land for any building, erection, or improvement thereon, it was held unnecessary to allege in the petition that the materials were actually used in the construction of the building.<sup>2</sup> The omission of a statement that the materials were furnished for the building cannot be cured by verdict, when no evidence was offered to show that they were so furnished.<sup>3</sup> It is not necessary for a plaintiff in a *scire facias sur mechanics' lien* to allege or prove that the work or material was furnished on the credit of the building.<sup>4</sup> It is not necessary to negative the cases set forth in the law in which no lien shall exist, but only to state affirmatively the facts which create a lien.<sup>5</sup> When it is averred that the owner knew the building was being built on his land, it is not necessary to state that he did not give any notice that he would not be responsible. That is matter of defence.<sup>6</sup> It is not necessary for the complaint to allege that there are no other lien claimants.<sup>7</sup> It is not necessary that plaintiff should allege in his petition or prove at the trial that he commenced his suit within ninety days after filing the lien. He should prove the time of filing his lien, and the petition itself will show its filing.<sup>8</sup>

§ 403. **Averments to be governed by Statutory Requirements; of Ownership.** — The laws creating the lien for the most part expressly declare what shall be alleged in the complaint. Every such statutory averment should be made.<sup>9</sup> These averments are generally the essential facts that show the claim is of such character that is protected by the lien. For example, where the statute provides that "any person who shall, by virtue of any contract with the owner of any building, or with the agent of such owner, perform any labor," etc., and "the complaint of the plaintiff shall contain a brief statement of the contract on which the claim is founded," it is a material point that the contract be made with the owner of the building, and unless it

<sup>1</sup> [Cohn v. Wright, 89 Cal. 86; Patent Brick Co. v. Moore, 75 Cal. 205; Holmes v. Richet, 56 Cal. 310; Bottomly v. Grace Church, 2 Cal. 90.]

<sup>2</sup> [Rall Bros. v. McCrary, 45 Mo. App. 365, 373.]

<sup>3</sup> [Fothman & Miller Planing Mill Co. v. Ritter, 33 Mo. App. 404.]

<sup>4</sup> [Noar v. Gill, 111 Penn. St. 488.]

<sup>6</sup> [Portoues v. Holmes, 83 Ill. App. 812.]

<sup>6</sup> [West Coast Lumber Co. v. Newkirk, 80 Cal. 275; Harlan v. Stufflebeem, 87 Cal. 508, 513.]

<sup>7</sup> [Fredrickson v. Riebsam, 72 Wis. 587.]

<sup>8</sup> [Twitchell v. Devens, 45 Mo. App. 283.]

<sup>9</sup> Skyrme v. Occidental Mill Co., 9 Nev. 219; Hunter v. Truckee Lodge, 14 Nev. 24.

is so made there is no lien. The complaint should show every fact requisite to establish the existence of the lien. It should be direct and certain as to the allegation that the contract was made with the owner of the building; or, to use the language of the statute, it must be made "with the owner of the building, or with the agent of such owner," and be so alleged.<sup>1</sup> Where the law only gives a lien for work, etc., "in pursuance of any contract, express or implied, with the owner of such house," etc., and a count in *indebitatus assumpsit* is filed, without any averment in it that the work was done at the instance and request of the owner, it will be defective on special demurrer.<sup>2</sup> So where a mechanics' lien, by express provision of the statute, extends only to the interest of proprietors or lessors of the property, a petition to enforce it, which simply avers that the lumber was furnished by plaintiffs and used by the defendant, in repairing a house on land "in the possession and under the control of the defendant," is bad, because it does not show that the defendant had such an interest in the land as the lien would attach to.<sup>3</sup> Again, where a lien is given when a contract is made "with an owner, or one having an interest or ownership in the land to be charged," the petition should show these facts.<sup>4</sup> So, in an action brought by a sub-contractor to enforce a lien claimed to have been acquired under a lien law which gives "any person who shall, by virtue of any contract with the owner thereof or his agent, or any person who, in pursuance of an agreement with any such contractor, shall," etc., it must appear by the complaint, and be proved, that the contracting owner had some interest in the property at the time the notice claiming the lien was filed.<sup>5</sup> And when the lien is only secured to those who contract with the owner or his contractor, and the petition "shall contain a brief statement of the contract on which it is founded . . . and all other material facts and circumstances," it must show what the contract was, and must aver that the person with whom the contract was made was either the owner of the premises, or was a person who had contracted with such owner for erecting, altering, or repairing the building. Merely alleging him to be the contractor and supposed owner thereof is insufficient.<sup>6</sup> The same proposition is thus expressed by another court. A party seeking to enforce a

<sup>1</sup> Wilcox v. Keith, 3 Oreg. 372.

<sup>2</sup> Carman v. Scribner, 3 Houst. (Del.) 554.

<sup>3</sup> Hawley v. Henderson, 34 Miss. 261; Shaw v. Allen, 24 Wis. 563; Hicks v. Murray, 43 Cal. 515.

<sup>4</sup> Porter v. Tooke, 35 Mo. 107.

<sup>5</sup> Bailey v. Johnson, 1 Daly (N. Y.), 61; Shaw v. Allen, 24 Wis. 563.

<sup>6</sup> Simpson v. Dalrymple, 11 Cush. (Mass.) 308.

lien under a mechanics' lien law must, by his pleading, bring himself strictly within its terms, and show his right to the lien as against those made defendants.<sup>1</sup> As where the lien is not given to a sub-contractor of a sub-contractor, and in no case beyond the amount of the original contract; a petition by a sub-contractor, which fails to set out the terms of the contract with the principal contractor, and that the sub-contract was within the power of the principal contractor to make, so as to bind the owner of the property, or that there was a sufficient fund due the principal contractor to pay the petitioner, or that he had performed his contract, is substantially defective.<sup>2</sup> So, if it be proposed to charge the estate of a married woman, it must be averred in the pleadings that there was either a contract with her, or an intent on her part to bind her separate property for the work and materials, or that the work and materials were necessary and proper for a full and complete enjoyment by her of her property. A mere allegation of indebtedness will not be sufficient.<sup>3</sup> But it is not necessary to set forth precisely the nature of the defendant's interest or tenure.<sup>4</sup> If this be attempted, the proof must correspond with the allegation. A lien filed against the fee is not supported by proof of a lien against a leasehold interest; for it is said, if the execution and sale follow, an interest would be sold different from that really bound; or if the leasehold interest only were sold, it would materially damage the interest of the owners of the reversion, both in fixing a blot on their title, and most probably in creating litigation between the holder of the lease and a purchaser at the sale.<sup>5</sup> But, where a subsequent purchaser at a sheriff's sale is made a party to a mechanics' lien to answer as to his interest, the complaint need not show a cause of action against him, as it is his duty, if he would protect his title, to set it up affirmatively.<sup>6</sup> Where the law only gives a lien after a demand and refusal to pay, these allegations must be made. It is not sufficient to aver in general terms that defendant refuses to pay.<sup>7</sup> A judgment of lien will not be sustained where the petition does not allege that the defendant is owner of the land charged.<sup>8</sup>

§ 404. **Averment of Contract.** — If the law creating the lien provide that it is to arise only in case of contract, or contract

<sup>1</sup> *Crowl v. Nagle*, 86 Ill. 437.

<sup>2</sup> *Thomas v. Industrial University*, 71 Ill. 310.

<sup>3</sup> *Black v. Rogers*, 36 Ind. 420.

<sup>4</sup> *Thomas v. Smith*, 42 Penn. 68.

<sup>5</sup> *Carey v. Wintersteen*, 60 Penn. 395.

<sup>6</sup> *Woollen v. Wishmier*, 70 Ind. 108.

<sup>7</sup> *Sheeley v. Funderburk*, 47 Ga. 287; *Gilbert v. Marshall*, 56 Ga. 148; *Anderson v. Beard*, 54 Ga. 138; *Brantley v. Raybon*, 61 Ga. 211; *Walls v. Rutherford*, 60 Ga. 439.

<sup>8</sup> [*Fein v. Davis*, 2 Wy. 118, 123.]



made in a particular manner, it must be so alleged in the complaint.<sup>1</sup> This allegation is frequently made necessary by express enactment. Thus, if a complaint must contain "sufficient of the contract to show the foundation of the plaintiff's claim to a lien, stating any terms which were specially agreed upon in the contract," it should be stated that a contract was made, when, what were its terms, what work was done, what to be done, and what materials were furnished. It is from this the court is to judge whether the applicant comes within the law.<sup>2</sup> If the only requirement is that the petition must contain a statement "of the nature of the contract," a petition which set forth that payment was to be made as the work progressed, and at the completion, if any balance was due the plaintiff, it should be paid as might then be agreed, this is a sufficient statement.<sup>3</sup> But where the act requires that the contract under which the lien is claimed should be set out in the petition, and made the foundation of the petition, "describing with common certainty the nature of the contract," it is not sufficient to set out a note, and aver that the note was given for work done on the building; and this, though the note states that such was the fact.<sup>4</sup> Another lien law provided that the lien should only exist in certain cases when the contract was in writing; and the same, or a duplicate, was filed in the clerk's office of the county in which the building was situated, — these were held to be essential averments.<sup>5</sup> Where "the petition shall contain a brief statement of the contract," and the contract as alleged was to furnish hardware at the usual market price to A. B., the proof did not show that all the hardware was to be furnished at the usual market price, but that on some articles a discount was to be made, and the proof further showed a contract with A. B. & Co. These variances were considered as fatal.<sup>6</sup> In regard to sub-contractors and others who have liens only when they, "in pursuance of an agreement with a contractor, shall, in conformity with the terms of such contract" (that is, the owner's) "perform any labor," etc., the complaint should show that their own contract with the contractor was made in conformity with the terms of the contractor's contract with the owner; for the first contractor might put up a different building than that provided for by the contract, which would give no lien against the owner of the

<sup>1</sup> *Simpson v. Dalrymple*, 11 Cush. (Mass.) 308.

<sup>2</sup> *Logan v. Attix*, 7 Iowa, 77.

<sup>3</sup> *Mix v. Ely*, 2 Greene (Iowa), 513.

<sup>4</sup> *Logan v. Dunlap*, 4 Ill. 183.

<sup>5</sup> *Sumnerman v. Knowles*, 33 N. J. L. 202.

<sup>6</sup> *Peck v. Standart*, 1 Bradw. (Ill.) 228.

land.<sup>1</sup> An erroneous statement in the complaint of a sub-contractor that the services were rendered under a contract with the owner, does not mislead him to his prejudice, and will not defeat the lien.<sup>2</sup> An objection that a petition to enforce a lien does not fully set out the agreement of the mechanic with the owner, it was held, should be taken advantage of by demurrer.<sup>3</sup> No lien can be maintained for labor performed under an entire contract, partly on the land described in a petition therefor, and partly on adjoining land, where there is nothing to ascertain what part of the account arose from labor performed on the land described.<sup>4</sup> An averment that D. promised to pay the plaintiff is sustained by proof that D.'s agent so promised.<sup>5</sup> And an averment that a contractor G. S. "as such contractor and *as agent for and on behalf of said Trautner*" the defendant employed the plaintiff, is sufficient, — the words "as such contractor" are surplusage, and do not vitiate the statement of agency.<sup>6</sup> If the contract can be made out from the notice with reasonable definiteness it is sufficient, although it is not stated in so many words that A. B. ordered the materials, etc.<sup>7</sup> When an original contract in writing is afterward modified by parol, the proper plan is to set out first the written agreement and then state how it was altered. But it is nevertheless sufficient if the complaint states the contract with reasonable certainty in its amended form.<sup>8</sup> When a new contractor (B.) has taken the place of the original contractor (A.) with no change in the contract, but simply a substitution of one man for another to carry out the original agreement, it is not necessary for a material-man to separate the items furnished to A. and B.<sup>9</sup> It is not necessary to state the contract price in the bill in order to show that the amount claimed does not exceed the contract price. If it does, that is matter of defence.<sup>10</sup> It is not necessary to allege the date when notice was given, nor that the owner owed the contractor anything when notice was given, nor that the account was approved by the contractor.<sup>11</sup> A sub-contractor's complaint must

<sup>1</sup> Broderick v. Boyle, 1 Abb. Pr. (N. Y.) 319; s. c. 2 E. D. Smith, 554; Quin v. McOlliff, 1 Abb. Pr. (N. Y.) 322.

<sup>2</sup> [Buckley v. Taylor, 51 Ark. 302, 307.]

<sup>3</sup> Goulding v. Smith, 114 Mass. 487.

<sup>4</sup> Foster v. Cox, 123 Mass. 45; McGuinness v. Boyle, Id. 570.

<sup>5</sup> [Parker v. Savage, &c. Co., 61 Cal. 348.]

<sup>6</sup> [McIntyre v. Trautner, 63 Cal. 429, 431.]

<sup>7</sup> [Germania B. & L. Asso. v. Wagner, 61 Cal. 349.]

<sup>8</sup> [White v. Soto, 82 Cal. 654, 655, 656; citing O'Connor v. Dingley, 26 Cal. 11; and Barilari v. Ferrea, 59 Cal. 1.]

<sup>9</sup> [Harmon v. S. F. &c. R. Co., 86 Cal. 617. In this case the proof did separate the items.]

<sup>10</sup> [Spalding v. Dodge, 6 Mackey (D. C.), 289.]

<sup>11</sup> [Norfolk & W. R. Co. v. Howison, 81 Va. 125; Roanoke, &c. Co. v. Karn, 80 Va. 589.]

show who was the owner and that the work was done under express or implied contract with him.<sup>1</sup> In an action to enforce a mechanics' lien for machinery and materials furnished and labor performed, a complaint to which is annexed a copy of an agreement under which certain specified articles were to be furnished for a certain price and a bill of particulars of all charges, including, as one item, the articles furnished under the specific contract, is held to be sufficiently definite and certain, although it does not state separately a cause of action for the articles furnished under the written agreement and one for the other articles furnished and labor performed.<sup>2</sup> If in an action to enforce a mechanics' lien the complaint alleges that the work was done at the special instance and request of the defendant, and that it was reasonably worth a certain sum, it sufficiently sets forth the contract under which the work was done, especially where the answer admits the employment and the doing of the work, and defends only on the ground that it was badly done.<sup>3</sup> The act of 1836, (Purd. Dig., vol. 2, p. 1032) requires the name of the contractor to be set out only where the contract of the claimant was made with such contractor.<sup>4</sup> Where an action is brought by a sub-contractor to enforce a lien upon moneys alleged to be due by said city to the principal contractor, the complaint must set forth the terms of the contract between the city and the principal contractor in such form as would be necessary were the suit between him and the city, and must clearly show that, under his contract, an indebtedness exists to him by the city upon which the sub-contractor has acquired a lien.<sup>5</sup> A complaint alleging that labor was done for one who was erecting "a building for said defendant" without affirming that he was doing it under a contract with the defendant or his agent is insufficient.<sup>6</sup> All jurisdictional facts must appear upon the face of the proceedings.<sup>7</sup> An objection that the complaint does not state the contract price must be raised by demurrer, and cannot be urged for the first time on appeal.<sup>8</sup>

§ 405. **Averments of Building and Amount due.** — Another averment ordinarily necessary to be made is, that the labor and materials, the character of which should be stated, have been

<sup>1</sup> [Adams v. Buhler, 116 Ind. 100, 102.]

<sup>2</sup> [Barnes v. Stacy, 73 Wis. 1.]

<sup>3</sup> [Edleman v. Kidd, 65 Wis. 18.]

<sup>4</sup> [Stevenson v. Dick, 13 Phil. 132.]

<sup>5</sup> [Breuchaud v. Mayor, &c., 61 Hun, 564.]

<sup>6</sup> [O'Neil v. St. Olaf's School, 26 Minn. 329.]

<sup>7</sup> [Ewing v. Donnelly, 20 Mo. App. 6.]

<sup>8</sup> [Russ Lumber, &c. Co. v. Garrettson, 87 Cal. 589.]

furnished in the erection of the building, and their amount and value.<sup>1</sup> Thus, where "mechanics and all persons performing labor or furnishing materials for the construction or repair of any building . . . may have a lien," it is necessary that the complaint allege that the materials were furnished for the building sought to be charged with the lien. It is not sufficient to aver that they were furnished to the contractor or owner, and were used in the construction of the building.<sup>2</sup> This becomes absolutely imperative if a statute should require the petition to contain a statement of the nature of the contract, "with a bill of particulars of his account;" a description of the indebtedness would not be sufficient, but a bill of particulars, with specific items of materials or labor furnished, or both, as the case might be, should accompany the petition; and this, though the account may have been settled by a promissory note.<sup>3</sup> If the bill of particulars is as definite as the nature of the transaction will permit, it will be sufficient.<sup>4</sup> Where materials are furnished without a special contract, a bill of particulars should accompany the complaint.<sup>5</sup> An averment in a complaint, referring to a bill of particulars attached thereto, which shows the amount due from the contractor to the plaintiff, is sufficient.<sup>6</sup> But where the work is done under a contract for a certain stipulated price, or is to be paid for in gross, no bill of particulars of items is necessary.<sup>7</sup> When there is no such peremptory direction, and the claim shows the work done, that it was performed under contract, the price stipulated, and the amount due to the claimant, it is a sufficient compliance, without stating the particulars of such labor or materials.<sup>8</sup> As between the owner and his contractor, the latter, in seeking to establish a lien, should also aver that an indebtedness still exists for the payment of the materials or labor. But where the proceedings are taken by a sub-contractor or material-man, who has a lien to the extent of funds due the contractor by the owner, it is not necessary for him to aver in his complaint that the money was due and payable to the contractor from the owner at the time of the filing of the notice of the plaintiff's claim; nor to aver negatively that the owner had not paid the contractor to the full contract price. The plaintiff is not bound to negative a possible defence. It is

<sup>1</sup> *Shaw v. Allen*, 24 Wis. 563.

<sup>2</sup> *City of Crawfordsville v. Barr*, 45 Ind. 258.

<sup>3</sup> *Greene v. Ely*, 2 *Greene* (Iowa.), 561.

<sup>4</sup> *Mix v. Ely*, Id. 513.

<sup>5</sup> *Stephenson v. Ballard*, 50 Ind. 176.

<sup>6</sup> *Merritt v. Pearson*, 58 Ind. 385.

<sup>7</sup> *France v. Woolston*, 4 *Houst.* (Del.)

<sup>8</sup> *Edwards v. Derrickson*, 4 *Dutch.* (N. J.) 39.

enough to show a *prima facie* right to recover, and would be against all ordinary rules to require the plaintiff to prove on the trial such a negative; and a party is not bound to aver what it is not necessary to prove. If the owner, in such case, wish to show that, by the terms of his contract with the original contractor, nothing has yet become payable, or that, by reason of payments made by him before the notice of claim was filed, nothing is now due from him, he must set up this defence by answer.<sup>1</sup> The contrary, however, is held in California. The courts say that a material-man is only entitled to be paid from the portion of the contract price which remains due and unpaid to the contractor when he (the material-man) files his lien, and when the complaint fails to allege that anything was due from the owner to the contractor when the lien was filed, it does not state a cause of action.<sup>2</sup> But where the complaint did not allege that anything *was due* from the owner to the contractor, but the answer raised that issue, and the court found that there was something due, and gave judgment, the case was sustained on this point.<sup>3</sup> A complaint should always allege the amount due the claimant.<sup>4</sup> The sub-contractor should show in his petition that under the contract an amount was due the contractor at the time the plaintiff's account began or later. A petition defective in this respect may, however, be amended or cured by evidence.<sup>5</sup> A sub-contractor's complaint should allege the amount of the original contract less payments made by the owner on the contract before the plaintiff began to work or furnish materials.<sup>6</sup> A complaint alleging that the owner paid \$375 to the contractor after the lien was filed, and also \$500 as a consideration for cancelling the contract, sufficiently states that something was due the contractor.<sup>7</sup> Where the owner has paid the contractor, the sub-contractor cannot hold the owner, unless he gave him notice before said payment, and the fact of said notice or suit while something was still due the contractor must always be averred.<sup>8</sup> If not, no evidence that the notice was in reality given will save the case. An allegation and finding of

<sup>1</sup> Doughty v. Devlin, 1 E. D. Smith, 635; Bailey v. Johnston, 1 Daly (N. Y.), 61; Jensen v. Brown, 2 Colo. 694.

<sup>2</sup> [Turner v. Strenzel, 70 Cal. 28, 30; Wiggins v. Bridge, 70 Cal. 437, 439; Rosenkranz v. Wagner, 62 Cal. 151; Wilson v. Barnard, 67 Cal. 423.]

<sup>3</sup> [O'Donnell v. Kramer, 65 Cal. 353.]

<sup>4</sup> City of Crawfordsville v. Irwin, 46 Ind. 440.

<sup>5</sup> [Martin v. Morgan, 64 Iowa, 270; Leiegne v. Schwarzler, 67 How. Pr. 131.]

<sup>6</sup> [Teahen v. Nelson, 6 Utah, 363, 368.]

<sup>7</sup> [Parsley v. David, 106 N. C. 225.]

<sup>8</sup> [Rosenkranz v. Wagner, 62 Cal. 151; Wilson v. Barnard, 67 Cal. 423; McKee, J., dissenting in the latter case on the ground that it was a lien on personal property, wherefore the decisions under the Mechanics' Lien law did not apply.]

the value of labor done is essential to a foreclosure of lien. A mere allegation of the price the contractor, under an unrecorded void contract, agreed to pay, is not sufficient, but such price is *prima facie* evidence of the value on which to base a finding.<sup>1</sup>

§ 406. **Averment of Time when Work was performed.**— This lien being, as shown in another chapter,<sup>2</sup> of limited duration unless promptly enforced by judicial proceedings, it has been held in those States where suit must be brought within a certain period after delivery of materials, or completion of the building or contract, that the time when these respective objects, as the case may be, were performed, must be averred, so that the court may know that the conditions required by the statute have been complied with. A complaint which fails to make such an averment, when thus made necessary, is bad.<sup>3</sup> As where an act requires suit to be brought within one year from the time the materials are furnished or labor done, the complaint must state when the labor was performed.<sup>4</sup> So, where the law provides only for a lien to be gained by filing a notice, etc., "after the performance of the labor or furnishing of the materials," a complaint must aver that the materials were furnished and the labor performed at or before the time when the notice to create a lien was filed.<sup>5</sup> These allegations are to receive a reasonable construction; and if it fairly appear when the materials were delivered or work was finished, all reasonable intendment will be made in their favor, and the complaint will be held good. Thus, where it was alleged that "plaintiff furnished the materials between the 6th day of April, 1862, and 28th day of June, 1862," it was decided to mean that plaintiff commenced furnishing the materials on the first-named date, and continued furnishing the same, from time to time, up to the last period, and was sufficient.<sup>6</sup> Where work is stated to have been begun October, 4, 1870, and finished April 24, 1871, the time of furnishing the materials need not be stated.<sup>7</sup> A complaint is demurrable if it does not show that the lien was filed within the statute time.<sup>8</sup> The dates of commencing work under such contract, and of furnishing the labor and materials, must be specified.<sup>9</sup> In a suit to enforce a mechanics' lien, if it appears upon the face of the bill that the suit was not brought within six

<sup>1</sup> [Booth v. Pendola, 88 Cal. 36.]

<sup>2</sup> Chapter XXIX.

<sup>3</sup> Cook v. Heald, 21 Ill. 425; Cook v. 562.

Refinot, Id. 437.

<sup>4</sup> Willamette v. Smith, 1 Oreg. 171.

<sup>5</sup> Jacques v. Morris, 2 E. D. Smith, 639.

<sup>6</sup> McCrea v. Craig, 23 Cal. 522.

<sup>7</sup> France v. Woolston, 4 Houst. (Del.)

<sup>8</sup> [Hurlbert v. New Ulm Basket Works, 47 Minn. 81.]

<sup>9</sup> [McKee v. Travelers' Ins. Co., 41 Fed. R. 117.]

months from the time plaintiff filed his account with the clerk, as required by the statute, the bill should be dismissed upon demurrer thereto.<sup>1</sup> An allegation that the items of the account were furnished "between the 6th and 17th of September, 1872, on which last day the account accrued, will, after verdict, be taken as stating that the last item was furnished on the 17th."<sup>2</sup> The complaint alleged that the last work was done November 5, 1881, and that the claim for a lien was filed January 3, 1881, "and within six months from the time of doing such work." Held that the allegation as to the date was clearly a clerical error, and, no objection having been made on the ground that the claim was not filed within six months, it was proper to admit evidence, that it was so filed, and to direct the complaint to be amended, if necessary in that respect.<sup>3</sup> The petition in an action to enforce a mechanics' lien should state the date when the materials were furnished and the labor was done, and also of the filing of the lien.<sup>4</sup>

§ 407. **Averment of Time when Contract was to be completed.**—In Illinois, the lien is given "provided that the time of completing the contract shall not be extended for a longer period than three years, nor the time of payment beyond the period of one year from the period stipulated for the completion thereof," and "the petition shall contain a brief statement of the contract on which it is founded." The petition must aver the times of performance and payment, in order that the court may know whether the suit is commenced within the time required by the statute,<sup>5</sup> or no decree can be had thereon;<sup>6</sup> and these allegations must be proved.<sup>7</sup> Where lumber was to be furnished during the spring and summer, and to be paid for within five or six months from delivery, a petition to enforce a lien which averred that the lumber was to be delivered and paid for within one year from the date of the undertaking, was held sufficient.<sup>8</sup> So, where the foreclosure of the lien had to be begun within a year from the time the debt became due, and an affidavit of the facts was necessary, it was considered indispensable that it should appear affirmatively therein that suit was instituted within the period.

<sup>1</sup> [Phillips v. Roberts, 26 W. Va. 783.]

<sup>2</sup> [Peck v. Bridwell, 10 Mo. App. 524.]

<sup>3</sup> [Edleman v. Kidd, 65 Wis. 18.]

<sup>4</sup> [Bradish v. James, 83 Mo. 313, 316.]

<sup>5</sup> Burkhardt v. Reisig, 24 Ill. 529; Cook v. Heald, 21 Ill. 425; McClurken v. Logan, 23 Ill. 79; Moser v. Matt, 24 Ill. 198; Muller v. Smith, 4 Ill. 543; Warren v. Harris, 8 Ill. 307.

<sup>6</sup> Radcliffe v. Pierce, 23 Ill. 473; Kinzey v. Thomas, 28 Ill. 504; Rogers v. Ward, 23 Ill. 473.

<sup>7</sup> Phillips v. Stone, 25 Ill. 77; Montag v. Lynn, Id. 169; Scott v. Keeling, Id. 358.

<sup>8</sup> [Powell v. Rogers, 105 Ill. 319, 325.]

aforesaid. If it did not so appear, and only judgment by default had been entered thereon, and subsequent proceedings by *feri facias* were taken to enforce the lien, it would be admissible to prove the fact that the suit was not commenced within the statutory period.<sup>1</sup> So, where "any person who shall, by contract, express or implied, or partly expressed and partly implied," shall have a lien, provided "when the contract is expressed, no lien shall be created, if the time stipulated for the completion of the work is beyond three years, or the time of payment beyond one year from the time stipulated for the completion thereof," it was held that a petition on an express contract, written or verbal, which does not show that the work was to be performed within the three years, and the payment within one year, is substantially bad. And in such case, if the contract set up in the petition is express, the mechanic cannot on the trial show it was partly express and partly implied.<sup>2</sup> The allegation in a bill that the contract was that complainant and his under-workman were each to perform a certain number of days' labor, to commence on a particular day, and to end on another certain day, is unnecessarily particular, and is not sustained by proof that the labor commenced and ended on different days from those alleged.<sup>3</sup> In Texas it is not necessary for plaintiff's petition to state the date of the original contract. The statute makes the fixing of the lien have reference to the time of maturing, and not the time of making the contract.<sup>4</sup>

§ 408. **Averment of Time when Notice was filed.** — A preliminary notice or claim of lien to be filed for record in some public office is frequently necessary under many of the systems devised for the enforcement of this lien.<sup>5</sup> When such is the fact and the notice must be filed within a definite period after completion of work or delivery of materials, and the act provides that, in all suits under it, "the petition, among other things, shall allege the facts necessary for securing the lien," the time of filing of notice or claim is a material, issuable fact, which must be alleged, and without which the petition will not show a cause of action. It is not enough to aver the filing of the demand, without an averment of the time when; for a filing at the wrong time is as inefficacious as if not filed at all. The petition should therefore show the time when the account was filed, so that the

<sup>1</sup> Phillips v. Hyde, 45 Ga. 220.

<sup>2</sup> Berlinger v. Hersey, 90 Ill. 70; Peck v. Standart, 1 Bradw. (Ill.) 228; Rogers v. Powell, Id. 631.

<sup>3</sup> Martin v. Eversal, 36 Ill. 222.

<sup>4</sup> [Lyon & Gribble v. Ozee, 66 Tex.

95.]  
<sup>5</sup> The complaint cannot serve as a substitute for such notice or petition. Wright v. Allen, 24 Wis. 661.



court may see and pronounce the judgment of the law that a cause of action exists, and that the defendant may have an opportunity of taking issue upon the fact material to the plaintiff's right. If no such averment is made, the petition would be fatally defective, and judgment would be arrested.<sup>1</sup> An averment that, within a certain time after the work was done and materials furnished, the account was filed, would not be a sufficient compliance with a law that required the account to be filed within a certain time "after the indebtedness shall have accrued."<sup>2</sup> So, where "within six months after the performance of such labor . . . the contractor . . . shall serve a notice in writing upon the county clerk," etc., it is essential that the complaint specify, and the evidence prove, that a notice in writing, within the above period, claiming a lien for the work or materials thus furnished, was filed.<sup>3</sup> The same was held under a similar law which required the complaint to state "the time when the notice was filed."<sup>4</sup> So, where the affidavit to foreclose a lien must show that it is prosecuted within one year after the debt becomes due, the averment in the affidavit meets fully the requirement if it alleges that the debt was contracted on Feb. 27, 1874, and that it fell due on Nov. 1, 1874, and the affidavit itself was made on Nov. 25, 1874. These figures appearing on the face of the affidavit make it as certain as figures can that the prosecution is within one year after the debt became due.<sup>5</sup> Again, where it was essential that the complaint should allege that the notice was filed within sixty days from the time of furnishing the materials, which it did not so allege, but did show in connection with a copy of the notice filed therewith, that the notice was filed within the time, the complaint was sufficient.<sup>6</sup> In a late case, where a law required claims to be filed within six months after filing of lien, and the complaint contained no averment that they were filed within the time, it was said that while the complaint would ordinarily be defective, yet the advantage is one to be taken by demurrer. After issue is joined, and a decision is rendered on the merits, an appellate court will not reverse for such error.<sup>7</sup>

§ 409. **Other Requisites of.** — No special form of complaint is necessary. In its preparation, the particular law under which

<sup>1</sup> Heltzell v. Langford, 33 Mo. 396;  
Clark v. Brown, 22 Mo. 140.

<sup>2</sup> Gault v. Soldani, 34 Mo. 150.

<sup>3</sup> Bailey v. Johnson, 1 Daly (N. Y.), 61.

<sup>4</sup> Dallas L. & M. Co. v. Wasco W. M.  
Co., 3 Oreg. 527.

<sup>5</sup> Moore v. Martin, 58 Ga. 411.

<sup>6</sup> City of Crawfordsville v. Boots, 76  
Ind. 32.

<sup>7</sup> Skyrme v. Occidental Mill Co., 9 Nev.  
219.

the lien arises should be carefully considered, and all acts made necessary to be done on the part of the claimant, in order for the lien to arise, should be averred to have been performed, and, on the trial, should be proved. When such particularity is observed, the complaint will generally show, as it should, that its object is the enforcement of a mechanics' lien.<sup>1</sup> The question of indebtedness and right to the lien may properly be presented in the same paragraph of the complaint.<sup>2</sup> Where the law does not specially require it, it is not necessary that the petition should contain a prayer for a special execution against the property alleged to be charged with the lien, if, from the account filed with the petition and referred to therein, which corresponds with that filed as a lien demand, it sufficiently appear that the object of the suit is the enforcement of the lien.<sup>3</sup> Complaint need not set out the notice of sub-contractor to owner where such notice is not the foundation of the action.<sup>4</sup> If a declaration be used instead of a complaint, it is not necessary that it conclude with the *proinde producit sectam* clause; it should end with a statement of the lien claim.<sup>5</sup> Objections of form, and those not going to matters of substance, must be made promptly; for, if only inartificially drawn, complaints will be held good on motions in arrest of judgment.<sup>6</sup> When not required by statute to be sworn to, they will be sufficient if signed in the name of the plaintiff by his attorney.<sup>7</sup> It is not error to enter judgment upon a power of attorney for a mechanics' lien, although no complaint is filed, when all material averments are inserted in the power.<sup>8</sup> Where the petition for a lien is wrongly addressed to the clerk of the county court instead of the clerk of the circuit court, this does not affect the jurisdiction of the court.<sup>9</sup> No other action can be joined with a suit to foreclose a mechanics' lien.<sup>10</sup>

<sup>1</sup> Foster v. Poillon, 1 Abb. Pr. 321.

<sup>2</sup> Bourgette v. Hubbinger, 30 Ind. 296.

<sup>3</sup> Johnson v. McHenry, 27 Mo. 264.

<sup>4</sup> Irwin v. City of Crawfordsville, 58 Ind. 492.

<sup>5</sup> Cornell v. Matthews, 3 Dutch. (N. J.) 522.

<sup>6</sup> Briggs v. Worrell, 33 Mo. 157.

<sup>7</sup> Brown v. La Crosse City, 21 Wis. 51.

<sup>8</sup> Agard v. Hawks, 24 Ind. 276.

<sup>9</sup> Challoner v. Howard, 41 Wis. 355.

<sup>10</sup> [Sweetzer v. Harwick, 67 Iowa, 488.]

## CHAPTER XXXV.

## SCIRE FACIAS.

§ 410. **Adaptation to Lien Law.** — The writ of *scire facias* has been adopted in several of the States as the appropriate remedy for the enforcement of the mechanics' lien. Although it was at common law a judicial writ to enforce the execution of some matter of record on which it was founded, yet it was so far an original that the defendant had to plead to it. In its new uses under the lien laws it is preceded by a claim of the mechanic, filed for record, which claim is recited in the writ, and thereby made part of it. It is therefore in the nature of a declaration, and the defendant pleads immediately to the writ, as he is usually required to do by its tenor.<sup>1</sup> The *scire facias* answers as a statement of claim and takes the place of a declaration. The variance is fatal where a lien is filed, "for materials furnished for the erection and construction" of buildings, and the evidence shows they were for "repairs."<sup>2</sup> So, a claim for work done and materials furnished "in and about the erection, construction, improvement, and fitting up the said building for the use for which they were constructed," will not sustain a lien for repairs and additions.<sup>3</sup> Under a statute which provided that "a just and true account of the demand justly due after all credits given, is to be filed, which is to be a lien, and an abstract is to be entered in a book," etc., this claim was considered a part of the record, and might, when the proceedings were by *scire facias*, stand in the place of a declaration.<sup>4</sup> The suing out of the *scire facias* is the institution of the suit, in which the fact of indebtedness is to be tried and ascertained as in an ordinary action; and a plea is good which sets up a cross demand, in other respects properly the subject of set-off, subsisting at the time of the commencement of the suit, which is the issuance of the *scire facias*. It is not necessary for the defendant to have acquired such cross demand prior to the laying of

<sup>1</sup> *Winder v. Caldwell*, 14 How. (U. S.) 434; *Pickman v. Robson*, 1 B. & Ald. 486.

<sup>2</sup> *Rynd v. Bakewell*, 87 Penn. 460.

<sup>3</sup> *Wetmore's Appeal*, 91 Penn. 276.

<sup>4</sup> *Cornelius v. Grant*, 8 Mo. 59; *Kees v. Kerney*, 5 Md. 419.

the lien.<sup>1</sup> The same rules of pleading are applicable to it as to other declarations, and likewise to pleas filed as defences.<sup>2</sup> Thus, if the claim filed, before the *scire facias* issues, shows that the debt was contracted by the owner with the plaintiff, *non assumpsit* would be a proper plea, because the claim shows a contract, express or implied, on the part of the defendant. But if the claim be for work and labor, or materials furnished by some person employed by the builder and not the owner, the law does not raise an *assumpsit* as between the plaintiff and the owner; and in such case the latter cannot plead *non assumpsit*, but must notify the plaintiff of the defence on which the demand is resisted.<sup>3</sup> Where the lien claim is required to give particulars of work and materials, and the proceedings are by *scire facias*, no bill of particulars is demandable. If the claim is not a compliance with law, the proper course is to move to quash the writ of *scire facias* on account of the defect in the lien claim filed.<sup>4</sup>

§ 411. **Used only to enforce Lien.** — In those States where this writ is used, it is a suit in the nature of a proceeding *in rem*, and depends for its existence upon the fact of a subsisting lien, to realize which is its object.<sup>5</sup> So that, after a judicial sale of the property, upon which the mechanics' claim was a lien, has been made, divesting all subsequent liens, a *scire facias* will not lie upon the claim, because it is only to be sustained upon the ground that the claim is a lien upon the building; and the moment the claim ceases to be a lien, the right of the party to proceed by or maintain a writ of *scire facias* ceases also. The only object of the writ is to obtain execution against the building; and if that cannot be had, the great object is gone. The ascertainment of the amount of the debt for which the plaintiff in the *scire facias* claims to have execution against the building is only incidental and preliminary to the award of execution, in order that the amount of money to be levied may be rendered certain and known. If, however, there should be any controversy as to the amount of the debts, which are liens, coming to any of the mechanics or others who furnished materials for the completion of the building, after it is sold, and the money arising therefrom be brought into court for appropriation or distribution, the court would have the power, if it should be necessary to have the amount ascertained by a jury, to order a feigned

<sup>1</sup> Brackney v. Turrentine, 14 Ark. 416.

<sup>2</sup> Nunn v. Claxton, 3 Exch. 712.

<sup>3</sup> Kees v. Kerney, 5 Md. 419.

<sup>4</sup> Wilson v. Merryman, 48 Md. 328.

<sup>5</sup> Leib v. Bean, 1 Ashm. (Penn.) 207.

issue for that purpose, when all the parties concerned in the fund would have notice and an opportunity of being fully heard, which could not well be in a *scire facias* at the suit of any one of them without notice to the others, which is never given.<sup>1</sup> Its use, however, is to be governed principally by the statute creating the remedy; and therefore, where an action might be brought against an owner for the amount due the contractor, it was held to be the proper practice to procure a judgment for the debt against the principal contractor, and enforce such judgment against the owner of the building by *scire facias*, and that no proceedings were authorized against the owner until the remedies against the contractor, who was primarily liable, should have been pursued.<sup>2</sup>

§ 412. *Revival.*—Another use made of the *scire facias*, and more in accordance with its common-law office, is the revival of the judgment of lien on the original claim. These judgments are presumed in many jurisdictions, like ordinary general judgments, to have been paid or extinguished after lapse of certain periods, unless revived by *scire facias*. The rules relating to the revival of judgments generally will be found applicable to this new class of cases, modified, of course, by any statutory directions.<sup>3</sup> Such revival, therefore, when made necessary, must be complied with by the mechanic within the period given, or the lien of his original judgment will be gone. Within what period the *scire facias* must be sued out, or judgment of revival obtained, depends upon the construction of the language of the particular law under interpretation. Thus, where the lien is to “terminate, unless the same shall be revived previously by *scire facias*, in the manner provided by law in the case of judgments,” if a judgment be not obtained until after the statutory limitation for issuing the *scire facias* is expired, it will be too late.<sup>4</sup> In another case, under the same law, it was held that a *scire facias* issued within the time to establish the right to enforce a mechanics’ claim, or have execution on a judgment, will revive the lien incidentally and by legal construction, although not purporting to be for the purpose of revival. A plea that more than the time allowed has elapsed since the claim on which the plaintiff proceeds was filed, and that no *scire facias* has been issued to revive it, is no answer to a *scire facias* issued within the time, to know why the amount of the claim should not be made out of the land.<sup>5</sup> The

<sup>1</sup> *Anshutz v. McClelland*, 5 Watts (Penn.), 487.

<sup>2</sup> *Lewis v. Williams*, 3 Minn. 151.

<sup>3</sup> *Blocher v. Worthington*, 10 Md. 1.

<sup>4</sup> *Hershey v. Shenk*, 58 Penn. 382.

<sup>5</sup> *Cornelius v. Junior*, 5 Phila. 171.

judgment, on a *scire facias* to revive judgment *sur* claim, reciting a former judgment, does not constitute a judgment *in personam*, under which the plaintiff might levy on and sell any real estate of the defendant. It is merely a continuance of the original suit.<sup>1</sup>

§ 413. **Service and Return of.**—The *scire facias* notifies the party, and gives him an opportunity of showing cause against enforcing the lien.<sup>2</sup> This right of defence is always allowed to any one whose property is sought to be charged.<sup>3</sup> The service of a *scire facias* on a terre-tenant is sufficient notice of the claim of a prior lien.<sup>4</sup> But a party who had never been legally informed of the proceedings to enforce the lien cannot be introduced upon the record as a new party, on the trial of a *scire facias*.<sup>5</sup> At common law the sheriff, on the return of the *scire facias*, either returned *scire feci* or *nihil*; that is, that he has given notice to the defendant, or that he has nothing by which he can make known to him.<sup>6</sup> Where the sheriff returned *nihil*, the plaintiff sued out a second or *alias* writ of *scire facias*. If the sheriff also returned *nihil* to the second writ, and the defendant did not appear, there was judgment against him by default, two *nihil*s being deemed equivalent to a *scire feci*.<sup>7</sup> Most of the statutes, however, have provided by express enactment for the manner of serving the *scire facias* in cases of lien. Thus, where the law requires the sheriff in serving the *scire facias* to leave a copy of the writ with some person residing in the house, or affixed to the door, etc., a return simply "*scire feci*" is insufficient.<sup>8</sup>

<sup>1</sup> Simpson v. Murray, 2 Penn. 76.

<sup>2</sup> Kees v. Kerney, 5 Md. 419.

<sup>3</sup> Thomas v. Turner, 16 Md. 105.

<sup>4</sup> Hinds v. Allen, 34 Conn. 185.

<sup>5</sup> Noll v. Swineford, 6 Penn. 187.

<sup>6</sup> 2 Wms. Saund. 72 y.

<sup>7</sup> Foster's Writ of Scire Facias, 355.

<sup>8</sup> Plummer v. Eckenrode, 50 Md. 225.

## CHAPTER XXXVI.

## DEMURRERS.

§ 414. **When allowable.**<sup>1</sup>—Demurrers under the mechanics' lien laws perform the same office as in ordinary actions.<sup>2</sup> Thus, where the petition alleges an interest in a husband, a demurrer to the petition admits the fact.<sup>3</sup> And a party interposing a demurrer, and relying upon any defect in the complaint as to non-joinder of parties or uncertainty, must let final judgment be entered upon his demurrer.<sup>4</sup> They should be framed according to the usual forms of pleading. A short plea, as "no lien," will not be considered a demurrer, either general or special.<sup>5</sup> As in every judicial investigation questions of law and of fact may arise, it is presumed, unless some method of determining the former is specially provided, or the common-law system of pleading entirely abolished, that a demurrer would be the proper mode of raising the issue. It is clear, if these proceedings are assimilated to civil actions, and demurrers are allowable in the latter, they would be proper pleadings under the lien law. A statute directed "that issue shall be joined upon claims made, and the same shall be governed, tried, etc., in all respects in the same manner as upon issues joined in all civil actions;" demurrers were permitted to be interposed, as well as pleas and answers to the plaintiff's claim. Where nothing in a statute confines the issues to be raised to the facts, the pleadings may be so framed as to present any issues, whether of law or fact, which the parties may desire to raise respecting the matters in controversy.<sup>6</sup> If there be both issues of law and fact, the issues of law should be disposed of before the trial of the issues of fact.<sup>7</sup> Any matter which tends to an issue of law upon the question of responsibility of the property to the lien is not irrelevant, and cannot be stricken out, except on demurrer;<sup>8</sup> and

<sup>1</sup> [See § 406.]

<sup>2</sup> *McDowell v. Hill*, 1 Phila. Brien v. Clay, 1 E. D. Smith, 649.

<sup>3</sup> *Greenleaf v. Beebe*, 80 Ill. 520.

<sup>4</sup> *Loukey v. Wells*, 16 Nev. 271.

<sup>5</sup> *Lee v. Burke*, 66 Penn. 336.

<sup>6</sup> *Doughty v. Develin*, 1 E. D. Smith, 625.

<sup>7</sup> *Waldo v. Richter*, 17 Ind. 624.

<sup>8</sup> *Brien v. Clay*, 1 E. D. Smith, 649.

a judgment against a party, while the record shows a demurrer to the complaint undisposed of, is error.<sup>1</sup>

§ 415. **When not.**<sup>2</sup> — Many formal objections, such as want of dates in the claim filed, etc., which might be fatal on special demurrer, or motion to strike off the claim, which seems to answer the same office, will, after pleading to the merits, be considered as waived.<sup>3</sup> Nor will a court always feel bound to sustain a demurrer upon a ground not raised on the argument.<sup>4</sup> And where the question, whether a building is within the lien law, depends upon its use and manner of attachment to the freehold, and these facts do not appear by the pleadings, the court will not decide the question on demurrer, but leave it to be shown by the evidence on the trial.<sup>5</sup> A petition will not be demurrable because it does not show the parties for whom the building was erected to be the owners of the land, when under the law the interest, whatever it may be, of a party in possession, who makes the improvement, may be sold, a purchaser taking the title only against him.<sup>6</sup> An answer to a mechanics' lien will not be stricken out as frivolous where it sets up a matter of law as defence, which same defence is then pending in other causes before the court, and is generally looked upon as a matter of importance; as where the question is whether a subsequent law applies to work and labor done before its passage.<sup>7</sup> A general demurrer going to the whole complaint cannot be sustained, although the latter is defective as to the main cause of action, if it be good in part.<sup>8</sup> Claiming in an answer in a general way, the advantages of a demurrer will not present the question of want of a proper party. A demurrer for that cause must show upon its face that specific ground of objection.<sup>9</sup>

§ 416. **Motions to quash.** — Technical demurrers are not always essential to test the validity of the proceedings. Defects apparent on the face of a lien claim filed may be taken advantage of by a motion to quash the *scire facias*.<sup>10</sup> The authorities give the rule that a pretended claim should, on motion, be stricken from the record, when by reason of defective or irregular statement it is not brought within the benefits of the mechanics' lien legislation. Records are not made to be laden

<sup>1</sup> Willamette v. Smith, 1 Oreg. 181.

<sup>2</sup> [See § 404.]

<sup>3</sup> Howell v. City of Philadelphia, 38 Penn. St. 471; Lee v. Burke, 66 Penn. 336; Scholl v. Gerhab, 93 Penn. 346.

<sup>4</sup> Doughty v. Develin, 1 E. D. Smith, 625.

<sup>5</sup> Coddington v. Beebe, 5 Dutch. (N.J.) 550.

<sup>6</sup> Steigleman v. McBride, 17 Ill. 300.

<sup>7</sup> Smith v. Manice, 1 Code, N. S. (N.Y.) 283.

<sup>8</sup> Jaques v. Morris, 2 E. D. Smith, 639.

<sup>9</sup> [Portones v. Badenoeh, 132 Ill. 377.]

<sup>10</sup> Baker v. Winter, 15 Md. 1.



with illegal claims; and owners whose property is so burdened are not to be put to the delay and expense incident to the trial of a *scire facias* before they may relieve themselves of a void claim which may cast a suspicion on the title of their property. Striking off such lien is the exercise of no higher authority than setting aside or vacating a void or irregular judgment.<sup>1</sup> So, in an action to enforce the lien, the objection, that the notice of lien filed in the recorder's office did not contain a sufficient description of the property against which the lien was sought, was considered not to be properly raised by demurrer to the complaint, but by motion to strike out that part of the complaint relating to the lien.<sup>2</sup> Defects, that a plea is not sworn to, should be taken advantage of by motion to strike out, and not by demurrer.<sup>3</sup> In other States it has been held that these formal objections may be raised either by demurrer or by motion to strike the claim off,<sup>4</sup> the court having necessarily summary power to strike from the public records an irregular claim which, though void, might cast a suspicion on the title to the property. In this last case, it is said, if it could be done on motion, it can be done on demurrer.<sup>5</sup> But questions of grave import, such as the constitutionality of a lien law, ought not to be decided summarily, on a motion to strike out part of a complaint as irrelevant. It should be raised by demurrer, or other more deliberate manner.<sup>6</sup> So the power to strike out a defence on motion should never be exercised in a case in the slightest degree doubtful, nor unless the court can, upon a mere statement of the case, and without argument, declare the defence to be irrelevant or frivolous.<sup>7</sup>

<sup>1</sup> Mitchell v. Martin, 3 Pittsb. 474.

<sup>2</sup> Howell v. Zerbee, 26 Ind. 214; Bour- 262.  
gette v. Hubinger, 30 Ind. 296.

<sup>3</sup> Loring v. Flora, 24 Ark. 151.

<sup>4</sup> Lybrandt v. Eberly, 36 Penn. 347.

<sup>5</sup> Lehman v. Thomas, 5 Watts & S.

<sup>6</sup> Brien v. Clay, 1 E. D. Smith, 649.

<sup>7</sup> Webb v. Van Zandt, 16 Abb. Pr.  
(N. Y.) 190.

## CHAPTER XXXVII.

## PLEADINGS.

§ 417. **Rules of Pleading applicable.** — In those States where the lien is enforced by the common-law writ of *scire facias*, the forms and rules of pleading, so far as applicable, are to be observed;<sup>1</sup> in those which have made it an equity proceeding, the rules of equity practice will govern;<sup>2</sup> and where it partakes in some respects of both a common-law and equitable character, or where the forms of pleading at law are abolished, it nevertheless is subjected to the same rules governing procedure in ordinary civil actions.<sup>3</sup> All judicial investigation must, of necessity, be carried on according to some system; and, though these laws are expressly declared remedial and as conferring general jurisdiction, they do not dispense with the forms of pleading recognized in such courts when administering remedial laws;<sup>4</sup> nor will well-established rules of pleading be violated to aid in their enforcement, or the adjustment of the rights of contending parties.<sup>5</sup> Thus, a defence purely equitable, and not pleadable at law, will not be received in a proceeding to enforce this lien, when the latter is enforced in a court of law; as where a vendee, to secure a surety for the purchase-money of land, mortgaged, before a contract with a mechanic to build a house thereon, the estate to the surety to save him harmless from his securityship, authorizing him, if compelled to pay the purchase-money, to take a conveyance to himself, which was done, and it was held that while the mechanic had no lien against the vested rights of the surety, yet the latter could not make his defence at law.<sup>6</sup> The tendency, however, of the decisions is, in cases arising under these lien laws, that matters of form not affecting the substance of the controversy should be disregarded, or raised at the earliest practicable period, in order to give the opposite

<sup>1</sup> Lee v. Burke, 66 Penn. 336.

<sup>2</sup> Sutherland v. Ryerson, 24 Ill. 517.

<sup>3</sup> Duffy v. McManus, 3 E. D. Smith, 657. If a case be not within a lien law, although framed and prosecuted under that statute, the rules of pleading pre-

scribed for such action will not apply. Coddington v. Beebe, 5 Dutch. (N. J.) 550.

<sup>4</sup> Kees v. Kerney, 5 Md. 419.

<sup>5</sup> Brady v. Anderson, 24 Ill. 110.

<sup>6</sup> Brown v. Morison, 5 Ark. 217.

party an opportunity to seek another remedy, if he be mistaken in that which he has adopted. This principle applies with peculiar force where the system of pleading would not give notice of the points relied on for the defence, and the claimant might be surprised, if they were not specially pleaded.<sup>1</sup> After a rule to strike off a lien for technical defects upon its face has been discharged, and the defendant has pleaded to the merits, it is too late to present again objection to formal deficiencies in the claim.<sup>2</sup> The plaintiff in a proceeding upon a mechanics' claim is entitled to demand an affidavit of defence in all cases, whether the action be in the ordinary form of a *scire facias* upon the claim, or of a feigned issue after payment of the money into court by the defendant.<sup>3</sup> A stipulation among the parties that no liens any of them might have should be lost by delay during the pendency of the proceedings, and that the rights of the parties should be determined in the cause, is sufficient to base a decree without the necessity of cross-bills.<sup>4</sup> The caption of a bill in equity forms no part of it, and the words "for the use of M." in the caption are not to be deemed an averment of assignment.<sup>5</sup> The rule of surplusage applies. The inclusion in the bill of particulars of some items for which no lien can be claimed, is not fatal if the alien items can be satisfactorily distinguished and eliminated.<sup>6</sup> When several liens are joined each must be stated in a separate count. But any paragraph of the first or other count may by reference be made a part of a subsequent count, and the repetition of identical matter saved.<sup>7</sup> The contents of the claim of lien may be pleaded by attaching to the complaint a copy of the claim.<sup>8</sup>

§ 418. **Pleas and General Issue.**<sup>9</sup> — There are no regular pleas in this anomalous form of action. They should distinctly state the facts upon which the defendant relies for his defence, or such as deny the allegations which he requires the plaintiff to prove. He may traverse the allegation of the doing of the work or furnishing of the materials, or that the work or materials, or both, amount to so much; or plead that the house is misdescribed, or that the work was not done within the period allowed; or he

<sup>1</sup> Blair v. Singerly, 7 Phila. 230.

<sup>2</sup> Humphries v. Addicks, 12 Phila. 200.

<sup>3</sup> [Williams v. Brown, 18 Phila. 311.]

<sup>4</sup> [Harwood v. Brownell, 32 Ill. App. 347.]

<sup>5</sup> [Spalding v. Dodge, 6 Mackey (D. C.), 289, 294.]

<sup>6</sup> [Nichols v. Culver, 51 Conn. 177, 180.]

<sup>7</sup> [Green v. Clifford, 94 Cal. 49, 51; citing Haskell v. Haskell, 54 Cal. 265.]

<sup>8</sup> [Russ Lumber Co. v. Garrettson, 87 Cal. 589.]

<sup>9</sup> This section was cited with approbation in McLaughlin v. Reinhart, 54 Md. 78, 81.

may set up payment, release, or other matter which would be a defence under the law. All these are questions of fact for the jury; and the pleadings should properly show whether the issue to be tried is one of fact or of law, and what is the true point in dispute.<sup>1</sup> This specific allegation of facts relied on is the better way of making defence, in the absence of legislative provision. If the plaintiff, however, should adopt such a plea as "no lien," it has been held to be sufficient, as tendering an issue of fact, under which the defendant might make any defence on facts arising *dehors* the record, — as, that the claim had not been in fact filed within the time allowed; that the work was not done or materials furnished on the building; that the plaintiffs had bound themselves to file no claim; or that the building was not such an one as was within the law. Defects on the face of the claim filed are not raised by such a plea.<sup>2</sup> Accordingly, where the plea in *scire facias* was "no lien," no question as to the sufficiency of the lien on its face can arise on the trial of issues of fact.<sup>3</sup> But a plea denying a legal conclusion, and not the facts relied on, is bad. So a plea in bar, averring that the materials were furnished on a credit which had not yet expired, is bad, because it goes only in suspension of the remedy, and should be pleaded in abatement.<sup>4</sup> So, when the *scire facias* named but one of two contractors, a plea in bar was bad, as it was matter only in abatement.<sup>5</sup> The plea of *non assumpsit* has been allowed as a general denial of indebtedness;<sup>6</sup> and in one case a terre-tenant was by leave of court permitted to defend thereunder, but the cases do not show what evidence was admitted.<sup>7</sup> Under the plea of *non assumpsit*, to a *scire facias sur* mechanics' lien, the defendant may set up any equitable defence showing failure of consideration, in whole or in part, of the contract which is the gist of the action.<sup>8</sup> The plea of *nil debet* has also been used as a general issue, when this mode of pleading is allowable in other actions.<sup>9</sup> A general denial puts in issue the sale of materials, the ownership of the real estate, etc., and the burden is on the plaintiff.<sup>10</sup> A plea by a defendant in a *scire facias* on a mechanics' claim who was named as owner, that he was not owner, is an improper plea, and will be stricken off on

<sup>1</sup> McDowell v. Hill, 1 Phila. 102.

<sup>2</sup> Lee v. Burke, 66 Penn. 336; Johns v. Bolton, 12 Penn. St. 339.

<sup>3</sup> McKelvey v. Jarvis, 87 Penn. 414.

<sup>4</sup> Campbell v. Scaife, 1 Phila. 187.

<sup>5</sup> Richabaugh v. Dugan, 7 Penn. St. 394; Howard v. M'Kowen, 2 Browne (Penn.) 150.

<sup>6</sup> Chambers v. Yarnall, 15 Penn. St. 266.

<sup>7</sup> Hopkins v. Conrad, 2 Rawle (Penn.),

316.

<sup>8</sup> [Blessing v. Miller, 102 Penn. 45.]

<sup>9</sup> Hicks v. Branton, 21 Ark. 186.

<sup>10</sup> [Hassett v. Curtis, 20 Neb. 162.]

motion. . . . The proceeding is entirely *in rem* and a sale will pass only the title of him who is named as owner. If a person named as owner may take issue on the fact of ownership, then an issue which has nothing to do with this proceeding is substituted for the real issue to be tried.<sup>1</sup> It is not necessary to set out the contract and allege its invalidity for want of record. This may be given in evidence.<sup>2</sup>

§ 419. **Special Pleas.** — The more modern system, adopted in many of the States, requiring a party to disclose the defence he relies upon, either by plea or answer, has had the effect to make special pleas or statements of frequent occurrence in the defence of these actions. Special pleas or answers, as the practice of the locality requires, may be filed, setting up facts *dehors* the record, which would be a defence to the indebtedness itself, or which, under the statute, would show that no lien existed, in consequence of non-compliance with its substantial provisions. Thus, where "the land upon which any building shall be erected, together with a convenient space round the same, etc., shall be also subject to the liens which are to be had under and by virtue of this act, if the said land shall have been, at the time of erecting the said building, the property of the person who shall have caused the same to have been erected," the only case in which the land can be subjected to the lien is where the owner has caused the building to be erected; and, consequently, it was a good defence that the land on which the building was erected was, at the time of the erection, the property of defendant, and that defendant did not cause the building to be erected.<sup>3</sup> So, a plea that the work was not done, nor the materials furnished, on the credit of the building when such are not protected by the statute.<sup>4</sup> So, a discharge of the lien by the premises against which it was filed having been sold under judicial process.<sup>5</sup> A denial by the defendant, on information and belief, of the recording of the notice of lien is sufficient to require plaintiff to prove that the notice has been recorded as required by law.<sup>6</sup> A defence founded upon a special contract must be pleaded; such matters the claimant is not compelled to set up in his complaint,<sup>7</sup> as an agreement to waive the lien.<sup>8</sup> But the plea must be sufficient in law. As where an owner set up that a release of himself had been executed and delivered by a material-man

<sup>1</sup> [Spare v. Walz, 15 Phil. 263.]

<sup>2</sup> [Yancy v. Morton, 94 Cal. 558, 560.]

<sup>3</sup> Sibley v. Casey, 6 Mo. 164.

<sup>4</sup> Gable v. Parry, 13 Penn. St. 181.

<sup>5</sup> Johns v. Bolton, 12 Penn. St. 339.

<sup>6</sup> [Cowie v. Ahrenstedt, 1 Wash. 416.]

<sup>7</sup> O'Brien v. Logan, 9 Penn. St. 97.

<sup>8</sup> Curtis v. Jones, 3 Denio, 590.

to the contractor, under agreement between the owner and contractor, and at request of the contractor, and it was held bad for not averring a delivery to, or to the use of, the owner.<sup>1</sup> So a plea that the work was measured, and setting forth the measurer's bill, is bad; for, if true, it is not essential to the plaintiff's recovery.<sup>2</sup> The defendant cannot bar suit by alleging title to the property in a third person, B. B.'s rights will not be affected by a trial in which she is not a party; only the defendant's interest, whatever it is, will be touched, and he cannot protect himself by setting up the rights of third persons.<sup>3</sup> In a proceeding to enforce a mechanics' lien, the title to the property sought to be charged with the lien cannot be litigated.<sup>4</sup> The owner cannot allege the illegal formation of the partnership or corporation from which he secured the materials.<sup>5</sup> The pendency of a sub-contractor's lien suit is no bar to the contractor's suit against the owner's estate.<sup>6</sup>

§ 420. **Allegation of Facts necessary to make Plea good.** — A mechanics' lien cannot be stricken off by petition based on questions of fact not arising upon the record.<sup>7</sup> They should be brought forward by plea, unless otherwise provided by statute, and the plea must, in substance, set up facts which, if proved, would be a good defence under the law. Thus, it was provided that the lien should exist for work done upon "a contract entered into with the owner of any building," etc.; an answer, stating that the property on which the lien was sought to be enforced was then owned by a third person, but not denying the ownership of the defendant at the time the contract was entered into, was bad.<sup>8</sup> Again where the complaint alleged that the defendant has or claims an interest in the land which is subject to the lien, this allegation is wholly immaterial, and a general denial does not amount to a disclaimer of such interest, but only puts in issue the fact that it was subject to the lien.<sup>9</sup> And in an action on the lien against a certain lot and a house erected thereon by a lessee, under an improvement lease, whereby the house was to be paid for partly out of the profits of the lot, the plea "that the defendant holds no lands bound by the alleged lien" was not good, either as a plea or as a means of raising an

<sup>1</sup> *Wetherill v. Harbert*, 2 Penn. St. 348.

<sup>2</sup> *Blair v. Slingerly*, 7 Phila. 230.

<sup>3</sup> [*Ford v. Wilson*, 85 Ga. 109, 114; *Moody v. Travis*, 76 Ga. 832.]

<sup>4</sup> [*Chambers v. Benoist*, 25 Mo. App. 520.]

<sup>5</sup> [*Yancy v. Morton*, 94 Cal. 558, 561.]

<sup>6</sup> [*Hall v. Bennett*, 48 N. Y. Super. Ct., 302, 305.]

<sup>7</sup> *Frick v. Gladdings*, 10 Phila. 79.

<sup>8</sup> *Ainsworth v. Atkinson*, 14 Ind. 538.

<sup>9</sup> *Elder v. Spinks*, 53 Cal. 293.

issue of fact.<sup>1</sup> But a plea that the person named as owner is not owner, is good; again, that the reputed owner had at the commencement of the building, and at the time of pleading, only a leasehold interest.<sup>2</sup> So, where the defendant is sued as contractor and owner, he has a right to plead that he is not and never was either contractor or owner; and, if substantiated, it will be fatal to the plaintiff's claim.<sup>3</sup> When, however, the proceeding is *in rem*, it has been held that the title of the defendant is not the subject of investigation, and the pleadings do not raise such an issue;<sup>4</sup> and that a plea that the premises are not liable to the debt does not put in issue the title to the property, nor compel the plaintiff to prove the ownership or estate of the defendant.<sup>5</sup>

§ 421. **Plea setting up Defect in Proceedings.** — Failures to comply with statutory requirements may be taken advantage of by way of plea, when they do not appear upon the face of the record. A plea of "claim not filed within six months," was not objected to.<sup>6</sup> And where it was held not to be an objection that a notice did not aver that the work was done within the statutory period, the defence of this fact might be set up by answer on the part of the defendant.<sup>7</sup> But the objection to proceedings for enforcing the lien, that certain specifications were not served upon the alleged owner within the statutory period, although it might be a good defence for the owner, cannot, so far as it relates to his interest, or the rights of those claiming through him, be raised by any other persons, excepting those acquiring rights before the commencement of the proceedings to enforce the lien.<sup>8</sup> Ordinarily, however, a vendee may defend on any ground which was available to the vendor.<sup>9</sup>

§ 422. **Payment.** — The plea of payment is generally held to admit the cause of action, and supersede the production of proof of it.<sup>10</sup> The formal validity of the lien is not put in issue by it, and under it the claim may be read to the jury as an admitted cause of action.<sup>11</sup> When the only issue in a *scire facias* on a lien is under the plea of payment, questions as to the sufficiency of the lien are waived. But such a plea does not waive an error in the proceedings by which the lien is filed against the entire

<sup>1</sup> Leiby v. Wilson, 40 Penn. St. 63.

<sup>2</sup> Haworth v. Wallace, 14 Penn. St.

118.

<sup>3</sup> Davis v. Stratton, 1 Phila. 289.

<sup>4</sup> Washburn v. Burns, 34 N. J. L. 18.

<sup>5</sup> Cornell v. Matthews, 3 Dutch. (N. J.)

522.

<sup>6</sup> Driesbach v. Keller, 2 Penn. St. 77 ;

Bayer v. Reeside, 14 Penn. St. 167.

<sup>7</sup> Lutz v. Ey, 3 E. D. Smith, 621.

<sup>8</sup> Ombony v. Jones, 21 Barb. (N. Y.) 520.

<sup>9</sup> Gray v. Pope, 35 Miss. 116.

<sup>10</sup> Gilinger v. Kulp, 5 Watts & S. 264.

<sup>11</sup> Lybrandt v. Eberly, 36 Penn. 347.

interest in the leasehold when the statute only gives it against the structure itself.<sup>1</sup> The nature of this plea has been said to be frequently misunderstood. It was first introduced into practice in actions of debt on bond, from necessity, and to let in evidence of facts which would furnish a ground for an injunction in chancery, where the demand was irresistible at law; and in such case, if the facts were made out, the jury were directed to presume everything to be actually paid which in equity and conscience ought to be paid. It is not, however, in the nature of a general issue, contesting the truth of every fact averred by the plaintiff; on the contrary, it admits the original merits as set out, and puts the defence on collateral grounds. As an equitable plea it is available only for what would sustain a bill in chancery; and as a legal plea, only for evidence of direct payment, or what in particular cases is equivalent to it. But in every such defence, whether legal or equitable, the demand on original grounds is admitted; and hence such plea to a *scire facias*, containing an averment of every fact necessary to enable the plaintiff to recover, admits them all, and they are to be taken *pro confesso*.<sup>2</sup> Under the plea of *payment* to a *scire facias* *sur* mechanics' lien, with proper notice, any equity which tends to defeat the plaintiff's action may be given in evidence; but without notice, the plea has no more than its common-law effect.<sup>3</sup> Proof of payment is not admissible under a general denial, nor need the plaintiff prove non-payment, though he must aver it.<sup>4</sup>

§ 423. **Set-off** — Pleas of set-off have frequently been recognized as good, when the proceeding by a sub-contractor to enforce the lien against the owner is combined with an action against the contractor. The contractor is the principal debtor, who is to defend the demand of the plaintiff, and may plead as against him a set-off or counter-claim. His position is analogous to that of the principal debtor in a case of garnishment.<sup>5</sup> In those cases where the law makes the contractor a party as well as the owner, and the suit is *in personam* against the former and *in rem* against the latter, it is in effect the same as commencing an action against the contractor for the recovery of the claim; and the contractor may avail himself of any defence to the claim, and has all the rights, as a defendant, which he would have had

<sup>1</sup> St. Clair Coal Co. v. Martz, 75 Penn. 384.

<sup>2</sup> Lewis v. Morgan, 11 Serg. & R. 234; Richabaugh v. Dugan, 7 Penn. St. 394.

<sup>3</sup> [Smaltz v. Ryan, 112 Penn. 423.]

<sup>4</sup> [Stephenson v. Ballard, 82 Ind. 87, 90; citing Hubler v. Pullen, 9 Ind. 273.]

<sup>5</sup> Westcott v. Bridwell, 40 Mo. 146.



if he had been sued in an ordinary action, independent of the proceedings to foreclose the lien. He accordingly may avail himself of a set-off to the whole, or to part of the plaintiff's claim; or if the set-off exceeds the claim of the plaintiff, he may, when the law allows it, have judgment for the excess. There is no reason why he should be turned over to another action to sue for the residue, when both parties are before the court, and every right or advantage they could have in another action is available in this.<sup>1</sup> But an owner against whom no personal claim is made cannot set up a set-off arising out of collateral matters.<sup>2</sup> So claims arising upon separate and distinct covenants in an agreement under seal cannot be set off against each other. As in an action filed to foreclose a lien, a building had been erected by the claimant under an agreement, which provided also for a lease to him for a term of years, a claim for rent accrued subsequently to the completion of the building could not be set off against the claim for the work done in erecting the building.<sup>3</sup> Nor can there be a set-off against a set-off.<sup>4</sup> It has never been decided that a set-off or counter-claim is good against a sub-contractor.<sup>5</sup> It seems, in these suits by sub-contractors, which must be brought against both owner and contractor, a matter which merely affects the existence of the lien will not prevent a recovery from the contractor. If the owner wishes to contest the lien, he should plead facts to show that the house or land are not liable. The contractor can only plead to the action to recover money from him on his contract with the plaintiff.<sup>6</sup> A lienor, as defendant in a mortgagee's foreclosure suit, cannot set up the lien as a counter-claim if the lien is subordinate to the mortgage. A counter-claim must tend to diminish or defeat the plaintiff's recovery.<sup>7</sup>

§ 424. **Recoupment.** — When there has been a total or partial failure of consideration, or acts of nonfeasance or misfeasance immediately connected with the cause of action, or any equitable defence arising out of the same transaction, the damages occasioned thereby may be recouped, not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action. The right to make such defence in action on contracts cannot

<sup>1</sup> *Grogan v. Raphael*, 6 Abb. Pr. (N.Y.) 306; s. c. 4 E. D. Smith, 754.

<sup>2</sup> *Agate v. King*, 17 Abb. Pr. (N.Y.) 159; *Bellinger v. Craig*, 31 Barb. (N.Y.) 197.

<sup>3</sup> *McQuaide v. Stewart*, 48 Penn. 198.

<sup>4</sup> *Gable v. Parry*, 13 Penn. 181.

<sup>5</sup> *Develin v. Mack*, 2 Daly (N.Y.), 94.

<sup>6</sup> *Tomlinson v. Degraw*, 2 Dutch. (N.J.) 73.

<sup>7</sup> [*Lipman v. J. A. I. Works*, 128 N. Y. 58, 63.]

now be doubted; and where a statute authorizing a lien gives the defendant liberty "to plead and make such defence as in personal actions for the recovery of debts," it applies equally to proceedings to enforce the lien. Therefore, under a written contract which stipulated that "the work is to be promptly executed, so that no delay shall be occasioned to the builder by having to wait for the carpenter's work," and also "that in any and every case in which the carpenter shall occasion delay to the building, the sum of twenty-five dollars per day shall be deducted for each and every day so delayed from the amount to be paid by this contract," under a notice of set-off evidence should have been admitted to prove delays, and defective work and materials.<sup>1</sup> So an answer in proceedings to enforce a mechanics' lien may set up a special contract, and assign breaches therein and claim damages therefor, if it propose to adjust all the equities between the parties, by allowing the plaintiff the value of his work and materials though performed and furnished under a special contract which is not completed.<sup>2</sup> Such a defence, however, is not a set-off. Recoupment and set-off are widely different. Under the former, unliquidated damages may be given in evidence, while, as a general rule, they are not the subject of set-off. This distinction has been maintained to such an extent, that where a statute required "a bill of particulars to accompany a plea of set-off," and an owner desired to produce evidence that the work was not done in accordance with the contract, it was held that it was not necessary for him to have served a notice of his claim in this respect by a bill of particulars, or otherwise, before the time of appearance, as it could not be supposed the legislature intended to embrace recoupment under the term "set-off," as used in the lien law.<sup>3</sup>

§ 425. **Another Cause pending.** — Another claim filed for the same debt is not a good plea.<sup>4</sup> So, on *scire facias* against A. as owner and B. as contractor, it is not a good plea of former recovery that a previous *scire facias* on the same claim had issued at the suit of the same plaintiff against C. as owner and B. as contractor, because it should appear to have been as well between the same parties as for the same cause of action.<sup>5</sup> Where a statute provided that a party "may cause a writ of *scire facias* to be issued," it was held that the remedy provided

<sup>1</sup> Winder v. Caldwell, 14 How. (U. S.) 434.

<sup>2</sup> Koempel v. Shaw, 13 Minn. 488.

<sup>3</sup> Goudier v. Thorp, 1 E. D. Smith, 697.

<sup>4</sup> Bournonville v. Goodall, 10 Penn. St. 133.

<sup>5</sup> Hampton v. Broom, 1 Miles (Penn.), 241.

was cumulative, and in no wise prevented a party from seeking his remedy in a court of chancery, which on account of its more enlarged remedial powers is the most appropriate tribunal.<sup>1</sup> And in an action against the owner of a building, to recover a balance alleged to be due from him upon the contract for the erection of a building, the defendant cannot set up as a bar to a recovery that mechanics and other persons had taken the necessary preliminary steps for establishing liens upon the building, for labor performed or materials furnished, at the request of the contractor. The defendant in such case should seek relief, either by instituting a cross-action, making all the persons claiming liens parties thereto; or by a special application for liberty to pay into court the amount due from him upon the contract to abide a final decision upon the claims, and for a stay of proceedings in the mean time. The mere pendency of claims under the lien law, which have not been satisfied or even established, can be no defence to an action for the recovery of the sum a party has expressly covenanted to pay.<sup>2</sup> But even under a law which allows a party to bring money into court and to compel others to interplead, as an owner under a mechanics' lien law, such defence is not available to a party who disputes the amount of his liability.<sup>3</sup> In another case, it has been held that in a proceeding by a sub-contractor against an owner it is a good defence that there are prior liens sufficient to absorb the funds remaining in the owner's hands. If their existence is set up as a bar to the enforcement of a subsequent lien, the claimant may deny their validity, and if he succeeds in impeaching them, take judgment for the amount of his lien.<sup>4</sup> To a bill filed to enforce an alleged mechanics' lien for work done, a plea of a former suit pending is insufficient which embodies in it a copy of the former bill showing that it was only for collection of the debt.<sup>5</sup>

<sup>1</sup> *Murray v. Rapley*, 30 Ark. 568.

<sup>4</sup> *Lehretter v. Koffman*, Id. 664.

<sup>2</sup> *Westervelt v. Levy*, 2 Duer (N. Y.), 354.

<sup>5</sup> [*Parmelee v. Railroad Co.*, 13 Lea, 600.]

<sup>3</sup> *Chamberlin v. O'Connor*, 1 E. D. Smith, 665.

## CHAPTER XXXVIII.

## AMENDMENTS.

§ 426. **No Amendment unless authorized by Statute.**<sup>1</sup> — Mechanics' liens are, in the absence of express provision, without the aid of the statute of jeofails, and beyond that of the common-law power of amendment.<sup>2</sup> In the early history of this law no provision was usually made to cure defects in the proceeding, but later statutes for the most part confer this power, in the discretion of courts. The tendency of decisions is in favor of a liberal exercise of this power, and amendments of petitions to enforce the lien are held to be warranted under a general statute which allows amendments "in any pleading or proceeding," etc., as being within the spirit as well as the letter of the law, in furtherance of justice.<sup>3</sup> It has been justly said that while rights created by statute for the protection of mechanics can only be established by showing compliance with all the conditions requisite to their existence, yet parties pursuing remedies for the enforcement of such rights should be treated with the same liberality that is accorded to those prosecuting rights resting on a different foundation. These statutory proceedings are not an exception to the liberal rules established generally in regard to the amendment of proceedings, and particularly when the law places the proceeding on the same footing as ordinary actions in this respect.<sup>4</sup> In another State, the same principle was held, under a lien law which provides that "the issues shall be governed, tried, and judgment thereon enforced, in all respects in the same manner as upon issues joined and judgments rendered in other civil actions;" and where a general power resides in the court to make amendments, this latter power extends to cases under the lien law.<sup>5</sup> So, where a lien law provided that the proceedings should "be amendable at all times while the proceedings progress," it was held that the

<sup>1</sup> This section was cited with approbation in *James v. Van Horn*, 39 N. J. L. 356.

<sup>2</sup> *Haviland v. Pratt*, 1 Phila. 364.

<sup>3</sup> *Witte v. Meyer*, 11 Wis. 295.

<sup>4</sup> *McGee v. Piedmont M'fg Co.*, 7 Rich. (S. C.) 263.

<sup>5</sup> *Sullivan v. Decker*, 1 E. D. Smith, 699.

power was as ample as that under a general code.<sup>1</sup> But, in another case, it was held that although there may be a law allowing general amendment of action, it does not permit, unless it appears in the statute, summary proceedings to enforce specific liens, which are governed by special regulations to be changed into formal actions at law, which are controlled in their commencement and mode of bringing parties into court by totally different rules. So that a party cannot amend a proceeding for the summary enforcement of a statutory lien, so as to change the case into an ordinary action of assumpsit.<sup>2</sup> This power of amendment has rarely been extended so as to interfere with rights of third parties accruing after the mistake and before the amendment.<sup>3</sup> The record of a mechanics' claim cannot be amended by an alteration in the description of the premises, so as to affect a *bona fide* purchaser without notice. As between the original parties, it is just; but the authorities are numerous to the effect that it cannot be permitted to affect a purchaser who bought before it was made.<sup>4</sup> Neither can a complaint which fails to make the necessary allegations required by the statute be amended as against a purchaser.<sup>5</sup> So, if a statute allow a notice to be filed for claims not due, as well as those due, of intention to hold a lien, the notice should, if it be filed as of the former class, set out the claim as not due; where it does not, and a longer period elapses than the law allows for the institution of a suit, the lien will be lost as against third persons. The notice will be considered to describe a claim as due; and the public, for whose information it was filed, will have a right to so regard it. All ambiguities should operate to the prejudice of the authors of them, rather than to that of the public.<sup>6</sup> But when the law allows amendments by antecedent enactment, parties who deal with the property have notice that such amendments are allowable, and hence the exercise of that power would work no injustice.<sup>7</sup> Where a statute is passed authorizing amendments, it will not be construed to be retrospective in effect, unless the words of the statute clearly require it, for prior to the enactment all persons had a right to look upon lien claims as unamendable, and to vend and purchase on that basis. To defeat by construction expectation so found, would be obviously inequitable.<sup>8</sup>

<sup>1</sup> *Gambling v. Haight*, 58 N. Y. 623.

<sup>2</sup> *Cochran v. Swann*, 53 Ga. 40.

<sup>3</sup> *Witte v. Meyer*, 11 Wis. 295.

<sup>4</sup> *Armstrong v. Hallowell*, 35 Penn.

<sup>5</sup> *Bailey v. Johnson*, 1 Daly (N. Y.), 61.

<sup>6</sup> *Wade v. Reitz*, 18 Ind. 307.

<sup>7</sup> *James v. Van Horn*, 39 N. J. L. 358.

<sup>8</sup> *Vreeland v. Bramhall*, 39 N. J. L. 1.

§ 427. **What Amendments allowed.** — Defects which have been remedied under statutes allowing amendments were those which did not change the form of the action.<sup>1</sup> Thus, where matters of form were amendable, it was held that issues that are to be tried were not matters of form, but the substance of the litigation, and could not be amended.<sup>2</sup> The provisions of a lien law making matters of form amendable at all times does not require the court to amend as a matter of course, but it is within its discretion, and it is not an abuse thereof to refuse an amendment which introduces an entirely new cause of action or defence.<sup>3</sup> But the amendment of a complaint for work and labor, and materials furnished, demanding a money judgment, by adding thereto the requisite averments and asking judgment of lien under a mechanics' lien law, has been held not to be an amendment which changes the cause of action, and is therefore allowable under a statute which allows amendments in the same cause of action. The amendment only changed the remedy, and not the "cause of action;" or, in other words, the labor performed and materials furnished were the same, whether the plaintiff proceeded under the original or amended complaint.<sup>4</sup> If it appear that no lien can be established under the amendment, the privilege will be denied;<sup>5</sup> or if the original proceeding so utterly fails to comply with the statute as to be a nullity, and the time has passed in which to begin proceedings, no amendment which amounts to an entire new proceeding will be allowed.<sup>6</sup> It seems that a clerical mistake in the rendition of a judgment on the lien may be corrected by a lower court, in case of appeal, *nunc pro tunc*, on proper application.<sup>7</sup> If the process issuing from a complete affidavit be defective it may be amended to conform to the affidavit.<sup>8</sup> In Georgia it is said, an affidavit of foreclosure cannot be amended.<sup>9</sup> But on the *facts* the amendment would have affected the rights of others intervening between the affidavit and its attempted amendment. And in a later case the court held that a laborer declaring on a special lien may amend the affidavit to make it claim a general lien, and so cover other property than the mere product of his labor.<sup>10</sup> Amendment will be allowed before argument, almost as a

<sup>1</sup> Bailey v. Johnson, 1 Daly (N. Y.), 61.

<sup>2</sup> McGraw v. Godfrey, 16 Abb. Pr. (N. Y.) N. S. 358.

<sup>3</sup> McGraw v. Godfrey, 56 N. Y. 610.

<sup>4</sup> Lackner v. Turnbull, 7 Wis. 105.

<sup>5</sup> Bailey v. Johnson, 1 Daly (N. Y.), 61.

<sup>6</sup> Witte v. Meyer, 11 Wis. 295.

<sup>7</sup> Horstkotte v. Menier, 50 Mo. 158.

<sup>8</sup> [Cumming v. Wright, 72 Ga. 767, 769.]

<sup>9</sup> [Cumming v. Wright, 72 Ga. 767, 769; Lewis v. Frost, 69 Ga. 755.]

<sup>10</sup> [Boyce v. Poore, 84 Ga. 574, 576.]

matter of course, but not after argument and particularly on general demurrer.<sup>1</sup>

§ 428. **Of Notice.**—It is doubtful if this power of amendment, without statutory warrant, extends to the notice or claim of lien which, in some States, is required to be filed before the institution of proceedings to enforce the lien. In a case in Indiana where there was a misdescription of the premises in the notice of intention to hold a lien, notwithstanding the complaint averred that the ownership of the property remained unchanged, and that no third person had acquired any rights that would be affected by a correction of the mistake, it was held that the notice was insufficient, and that the court had no power to reform it.<sup>2</sup> In New Jersey, although liberal provisions are made for amendments of the files and records of courts, yet where the claim has to be filed as a record in the county clerk's office and is not a part of the proceedings in the suit, it cannot be amended by adding another claimant.<sup>3</sup> In New York, where amendments of these proceedings were allowed, it was decided that the court could not create the lien to be foreclosed by amending defects in the previous notice. The most the court could do would be, upon a complaint containing proper averments, to overlook immaterial errors, or sustain an imperfect notice, which was in substantial compliance with the law.<sup>4</sup>

§ 429. **Of Complaint.**—The petition or complaint and summons are all capable of correction under a general power of amendment.<sup>5</sup> They must be subjected to the principles governing pleadings generally, and, when defective in averment of essential facts, may be amended.<sup>6</sup> Thus, if a sub-contractor's complaint should show that his own contract with the contractor was made in conformity with the terms of the contractor's contract with the owner, which is not done, it has been allowed to be cured by amendment.<sup>7</sup> So a complaint defective in the description of property has been amended;<sup>8</sup> the notice of lien, being correct, furnished a subject-matter to amend by.<sup>9</sup> So, where the proceeding was equitable in character, it was held that a complaint that incorrectly recited when a notice or claim of lien

<sup>1</sup> [Wood & Co. v. Wil. Conf. Academy, 5 Houst. (Del.) 513, 519.]

<sup>2</sup> Lindley v. Cross, 31 Ind. 109.

<sup>3</sup> Vreeland v. Boyle, 37 N. J. L. 346.

<sup>4</sup> Beals v. Cong. B'nai J., 1 E. D. Smith, 654.

<sup>5</sup> Witte v. Meyer, 11 Wis. 295.

<sup>6</sup> Duffy v. Brady, 4 Abb. Pr. (N. Y.) 432.

<sup>7</sup> Broderick v. Boyle, 1 Abb. Pr. (N. Y.) 319; Broderick v. Poillon, 2 E. D. Smith, 554.

<sup>8</sup> Duffy v. Brady, 4 Abb. Pr. (N. Y.) 432.

<sup>9</sup> Wasson v. Beauchamp, 11 Ind. 18.

was filed might be amended.<sup>1</sup> Answers to the complaint have also been permitted to be amended, until they have tendered a material issue of fact.<sup>2</sup> A mistake in a judgment as to the date when a mechanics' lien attached may be corrected by proper proceedings; and the occurrence of such mistake, if corrected, does not waive any priority to which the plaintiff was entitled when the judgment was originally rendered, particularly if no rights of innocent third parties have attached.<sup>3</sup> When the error only applies to the form of the judgment, which may be remedied by the entry of a new judgment, the court, even on appeal, may cure the defect.<sup>4</sup> And where the plaintiff filed a petition for a mechanics' lien by the name of Witter, and his real name was Witte, in which latter name he obtained a judgment, the judgment was not void, and the court allowed an amendment of the petition under a statute which allowed amendments "in any pleading or proceeding by correcting a mistake in the name of a party."<sup>5</sup> On appeal, the court will presume that in ordering such amendments the court below proceeded according to law, and, the record being silent upon the subject, that due notice of the motion was served on the defendant's attorney. Such amendments should not be made on an *ex parte* application. If no notice of the application be in fact served, the opposite party should move to set aside the amended pleading or judgment, upon his affidavit showing that fact; and in case this motion is denied, an appeal may usually be prosecuted.<sup>6</sup> The effect of the amendment of judgments, when it involves the merits of the case, is to open the judgment; but this will not be done when the application is only to supply an omission or correct an error.<sup>7</sup>

§ 430. **Of Parties.**<sup>8</sup> — In respect to amendments as to parties to the proceeding, where a statute allows the plaintiff, during the progress of a trial, to amend his writ and pleadings by "striking out the names of one or more defendants, when there are several," in a proceeding to enforce this lien, after the jury is sworn and the evidence heard, it is not error if the court permit the plaintiff to enter a dismissal as to some of the defendants, so far as a personal judgment is sought against them, and to continue them as parties to the proceeding to enforce the lien.<sup>9</sup> So, if a power reside in the court to add new parties, in a suit against the owner by a sub-contractor claiming for money alleged

<sup>1</sup> Willer v. Bergenthal, 50 Wis. 474.

<sup>2</sup> Waldo v. Richter, 17 Ind. 634.

<sup>3</sup> Monroe v. West, 12 Iowa, 119.

<sup>4</sup> Walker v. Paine, 2 E. D. Smith, 662.

<sup>5</sup> Witte v. Meyer, 11 Wis. 295.

<sup>6</sup> Schmidt v. Gilson, 14 Wis. 514.

<sup>7</sup> Hill v. La Crosse & Mil. R. R., 11 Wis. 214.

<sup>8</sup> [See § 431.]

<sup>9</sup> Scoville v. Chapman, 17 Ind. 470.



to be due the contractor, the latter is a proper party, and will be ordered to be brought in on the defendant's application, upon proper notice, and will be compelled to answer the complaint, and bound by the judgment.<sup>1</sup> It is not very material in what particular form the application to cause the contractors to be made parties comes before the court; but, in general, the order should be made on the defendant's motion or petition, as it is mainly for his benefit.<sup>2</sup> Under a law which requires the owner of the land and builder both to be made parties, and a summons is issued only against the builder, in a case where the same person is builder and owner, it may be amended either before pleading to the declaration, or after; but the defendant, by appearing to the suit and pleading pleas appropriate to the owner, waives the objection.<sup>3</sup> So an appearance of a defendant by attorney upon the trial, in an action under the mechanics' lien law, is a waiver of any defect in the service of the summons, and binds the defendant as in any other action.<sup>4</sup> In a suit against husband and wife on a lien for the debt of the husband, the proceedings were amended by striking the name of the wife from the record, although she was described in the lien claim as joint owner.<sup>5</sup> In Pennsylvania, however, where it was provided "that the plaintiff shall be permitted to amend his declaration or statement," a defect of want of proper parties was considered not amendable. The utmost to which the cases thereunder have gone, was the correcting a mistake of misnomer,<sup>6</sup> and allowing a *scire facias* upon a claim against a firm, by its firm name, to state, for the first time, the individual names of the partners.<sup>7</sup> So, "when a married woman is a party, her husband must be joined with her in all actions," etc., an action under the lien law is no exception to this rule, and the mistake cannot be amended.<sup>8</sup> In equity "new parties may be introduced at any time."<sup>9</sup> Any one whose interest requires may be made a party at any time before final decree.<sup>10</sup> But amendments introducing new parties cannot be made after the statutory period has expired.<sup>11</sup>

§ 431. **After Statutory Limitation has expired.** — Prior to the expiration of the statutory period in which the lien must be prosecuted there is no difficulty in allowing amendments, when

<sup>1</sup> Sullivan v. Decker, 1 E. D. Smith, 699.

<sup>2</sup> Foster v. Skidmore, Id. 719.

<sup>3</sup> Cornell v. Matthews, 3 Dutch. (N. J.) 522.

<sup>4</sup> Mors v. Stanton, 51 N. Y. 649.

<sup>5</sup> Washburn v. Burns, 34 N. J. L. 18.

<sup>6</sup> Noll v. Swineford, 6 Penn. 187.

<sup>7</sup> Black's Appeal, 2 Watts & S. 181.

<sup>8</sup> Latshaw v. McNees, 50 Mo. 381.

<sup>9</sup> [Gress Lumber Co. v. Rogers, 85 Ga. 587, 591.]

<sup>10</sup> [Snodgrass v. Holland, 6 Colo. 596, 599.]

<sup>11</sup> [Knox v. Hilty, 118 Penn. 430, 434; see § 431.]

they are permitted by statute.<sup>1</sup> But notwithstanding amendments are authorized, it is doubtful if a mechanics' claim can be amended after the expiration of the statutory period in which the claim might be filed.<sup>2</sup> A claimant, in one case, was not allowed to alter or amend his claim as to change the locality of the building to be subjected to the lien.<sup>3</sup> Again it was held that where a new party defendant is brought into a suit to enforce a mechanics' lien by amendment of the petition, the suit as to him is brought only from the time he is made a party, and it can have no relation back, so far as he is concerned, to the time of bringing suit against the original defendants.<sup>4</sup> Where the statute said, "No lien shall continue to exist for more than ninety days after the lien shall be filed, unless within that time an action shall be instituted thereon," etc., action was commenced within the period against a husband, but subsequent to the ninety days the claimant filed an amended complaint against the wife, she pleaded the statute of limitations of ninety days; held, the amendment introduced a new party, as to her it was the commencement of the action, and the statute of limitations was a complete bar, so far as she was concerned.<sup>5</sup> In an action by a material-man against the owner, the petition cannot be amended so as to bring in the original contractors, after the time for suit has expired, and the action cannot be maintained unless they are parties.<sup>6</sup> In general an amended complaint relates back to the time of the original complaint.<sup>7</sup> But a party who brings a personal action cannot so amend it after the period allowed to file liens has expired, as to turn it into a proceeding to enforce the lien.<sup>8</sup> While important amendments cannot be made after the expiration of the time allowed for filing lien, yet if immaterial and unnecessary amendments are made they will not invalidate the claim.<sup>9</sup> In another case, where the name of the claimant was wrong, it was held that the fact the time had expired was not a sufficient reason to take the correction of the above mistake out of the power of amendment.<sup>10</sup> So, again, a plaintiff was allowed to amend the description of the premises

<sup>1</sup> *Schriffer v. Saum*, 81 Penn. 385; *Hunter v. Truckee Lodge*, 14 Nev. 24.

<sup>2</sup> *Russell v. Bell*, 44 Penn. 47; *Dearie v. Martin*, 78 Penn. 55.

<sup>3</sup> *Gault v. Wittman*, 34 Md. 35.

<sup>4</sup> *Crowl v. Nagle*, 86 Ill. 437; [*Bennitt v. Wilmington S. M. Co.*, 119 Ill. 9; *Gardner v. Watson*, 18 Bradw. 386; *Haines v. Chandler*, 26 Ill. App. 400; *Knox v. Hilty*, 118 Penn. 430, 434.]

<sup>5</sup> [*Leibs v. Engelhardt*, 78 Ala. 508; *Phillips*, § 431, cited with approval.]

<sup>6</sup> [*Bombeck v. Devorss*, 19 Mo. App. 38.]

<sup>7</sup> [*White v. Soto*, 82 Cal. 654, 658.]

<sup>8</sup> *Dinkins v. Bowers*, 49 Miss. 222.

<sup>9</sup> *Fourth Ave. Bap. Ch. v. Schreiner*, 88 Penn. 124.

<sup>10</sup> *Witte v. Meyer*, 11 Wis. 295.

in the petition, notwithstanding more than the period in which to bring suit had elapsed before the filing of the amendment. The amended petition was only a continuance of the original proceeding, and not the commencement of a new action.<sup>1</sup> Again, it was said that an amendment of the petition for a lien, although technically it may set out a new contract, will not expose the cause of action to the bar of the statute limiting the time for filing a petition. In applying the statute of limitations in such cases the identity of the original and amended petition is not to be determined by strict and technical rules.<sup>2</sup> Again, where the claim embraced by mistake other property than that covered by the lien, an amendment was allowed to correct it, in limiting the claim to the land properly chargeable, even after the period for filing the claim had expired.<sup>3</sup> An amendment of a statement of claim must, in general, be made within the time allowed for filing the claim.<sup>4</sup> But the power of amendment will be liberally construed to save a limitation, and an amended petition filed after the expiration of the time for beginning suit will be sustained if the rights of third persons are not injuriously affected.<sup>5</sup> As to incumbrancers and grantees of the owner, an amendment seeking to cover the incumbered property by the lien is the beginning of the suit, and if the period for suit has expired before the amendment, the incumbrancers and grantees are secure.<sup>6</sup> An amendment which merely makes the claim more precise and specific will be allowed after the period for filing the lien has expired.<sup>7</sup> An amendment of a petition in an action on a mechanics' lien made after the time when the suit could be brought, which changes the original petition only by alleging the time of filing the lien, and by correcting the name of the contractor, is properly allowed.<sup>8</sup> The petition may sometimes be amended and new parties brought in after the two years limited for suit have expired.<sup>9</sup>

§ 432. **Time when to be made.**—The time when amendments may be made is generally within the discretion of the court. A party who obtains leave to amend should file his amendment within the time prescribed, or not at all, unless further leave be

<sup>1</sup> *Mann v. Schroer*, 50 Mo. 306; [*Huse v. Washburn*, 59 Wis. 414.]

<sup>2</sup> *Phoenix Mut. Ins. Co. v. Batchen*, 6 Bradw. (Ill.) 621.

<sup>3</sup> *O'Leary v. Burns*, 53 Miss. 171.

<sup>4</sup> [*McDonald v. Rosengarten*, 134 Ill. 126.]

<sup>5</sup> [*Hannon v. Gibson*, 14 Mo. App. 33, 36.]

<sup>6</sup> [*Watson v. Gardner*, 119 Ill. 312.]

<sup>7</sup> [*Linden Steel Co. v. Ref. Co.*, 138 Penn. 10.]

<sup>8</sup> [*Newman v. Jefferson City, &c. Railway Co.*, 19 Mo. App. 100.]

<sup>9</sup> [*Manly v. Downing*, 15 Neb. 637, 640.]

given.<sup>1</sup> They will sometimes be allowed at the hearing, and if they do not essentially change the case, a continuance will not be granted.<sup>2</sup> Ordinarily they cannot be made in a court of appeals, but must take place in the court below, even under a law which provided "that such amendments may at any time be made in the proceedings under the mechanics' lien laws as may be necessary and proper to effect the objects, intents, and purposes of the said laws."<sup>3</sup> A contractor whose interests are not affected will not be allowed to object on appeal to an amendment against an owner.<sup>4</sup>

<sup>1</sup> *Haight v. Schuck*, 6 Kan. 192.

<sup>2</sup> *Martin v. Eversal*, 36 Ill. 222.

<sup>3</sup> *Baker v. Winter*, 15 Md. 1.

<sup>4</sup> *Hartman v. Sharp*, 51 Mo. 29.

## CHAPTER XXXIX.

## WITNESSES.

§ 433. **Admissibility generally.** — The practical value of the adjudications on the competency of witnesses has been materially impaired by the recent law reforms, which have, in nearly all the States, removed the disabilities of parties and persons in interest, and enabled them to testify. The lien laws constitute no exception to the provisions established for other proceedings, so that parties will be permitted to testify or not in this, when admissible in other suits.<sup>1</sup> As where a married woman could not make a valid contract jointly with her husband, except where it related to her separate property, and a complaint upon a lien alleged a joint contract with husband and wife, but did not show that the wife had any separate interest in the property, it was held that no cause of action was shown against the wife, and hence the husband was a competent witness in his own behalf.<sup>2</sup>

§ 434. **Of Contractor.** — There seems to be considerable conflict of authority as to the competency of a contractor to testify in favor of the claimant on proceedings brought by a sub-contractor against the owner.<sup>3</sup> In some cases he is declared to be an admissible witness,<sup>4</sup> because his interest is balanced between the claimant and the owner. That he is bound to the owner for the performance of the work, and to pay for all the materials he used; and if he do not do so, and the owner sustains loss, or is compelled to pay money by reason of his default, he is liable to the owner to make him full indemnity. He owes, also, the sub-contractor the debt. If the latter recovers, then the contractor's debt to the sub-contractor is paid, and his own claim against the owner reduced to a corresponding extent. So that, upon the question, whether he himself owed the sub-contractor anything, he would be testifying against his interest. He would

<sup>1</sup> Briggs v. Titus, 7 R. I. 441.

<sup>2</sup> Howell v. Zerbee, 26 Ind. 214.

<sup>3</sup> Spackman v. Caldwell, 3 Phila. 375.

<sup>4</sup> Wolf v. Batchelder, 56 Penn. 87.

be taking his own money from the owner's hands, and forever depriving himself of its enjoyment, by giving it to the claimant, from whom he could never reclaim it. Upon the question, whether the owner was indebted to the contractor, the latter's interest is balanced; for, being bound to indemnify the owner against such claims, it is as much for his interest to protect the owner as to secure the debt due the sub-contractor. For if the owner should be compelled to pay money to the sub-contractor, he could recover full indemnity from the contractor. In other words, if the money is due from the owner to the contractor, then the interest of the contractor is balanced, because the effect of a recovery is to take his own money and pay his own debt, and all recovered is a proper charge against the witness, and reduces the owner's liability to him. If no money is due from the owner to the contractor, then his interest is balanced, because, although the effect of a recovery is to pay his indebtedness to the sub-contractor, it nevertheless creates a corresponding liability to the owner against himself. And in an action by the owner against him to recover indemnity, or in an action between them to settle their accounts under the contract, although the judgment recovered by the sub-contractor in this suit would be evidence in the owner's favor of the amount he had been compelled to pay to satisfy liens arising from the contractor's default in paying his own debt, such judgment would not be evidence in the contractor's (the witness) favor to prove that when it was rendered anything was due from such owner.<sup>1</sup> So, where a party who stands in a similar position, as an employee of a sub-contractor, who claimed a lien on funds against the owner, such sub-contractor is a competent witness for the owner to defeat a recovery. If the employee recovered, the recovery paid the sub-contractor's debt. If the employee did not recover, the liability of the sub-contractor to his employee was not affected by the proceeding. If the action was defeated by showing that nothing was due to the sub-contractor, or by proof that nothing was due from the owner, then any evidence of the sub-contractor to establish these defences was against his interest; and if it was defeated by proof that nothing was due to the employee, still the result would not bar the employee in an action against the sub-contractor, if brought about by the testimony of the sub-contractor himself.<sup>2</sup> Again, where lumber was furnished to sub-contractors for the erection of a building, they were held

<sup>1</sup> Cannon v. Van Wagner, 2 E. D. Smith, 590.

<sup>2</sup> Cusack v. Tomlinson, 1 E. D. Smith, 716.

competent to prove that it was purchased and delivered to be used in the building.<sup>1</sup>

§ 435. **When Contractor not admissible.** — On the other hand, it has been held that a sub-contractor cannot use the contractor as a witness in his behalf.<sup>2</sup> Where a sub-contractor files his lien against a building, and proceeds to enforce the same for the amount due from the owner to the principal contractor, and such indebtedness is the principal matter in issue, the principal contractor cannot prove such indebtedness, on the ground of interest. It is for the contractor's interest to show that the owner is indebted to him, which is one of the facts which the sub-contractor is obliged to prove; and whatever sum the owner owes him on the contract, goes to pay the debt, which he owes the sub-contractor for labor. He, therefore, has a direct interest in the event of the suit. If the indebtedness of the owner to him on the contract is an admitted fact, he is a competent witness for the sub-contractor; as he is interested against the party calling him, he being interested to deny that he owes the sub-contractor anything for his labor.<sup>3</sup> He is, likewise, not a competent witness for the owner, if it appear that he has been paid in full for his work and materials. But he may be made competent by a release from the owner for his liability over to him for costs, to which he might be subjected in the event of a recovery against him.<sup>4</sup> But on trial of a *scire facias* against the owner and two contractors, it was adjudged not admissible for the owner and one of the contractors to release the other contractor from liability for costs, and render him a competent witness for the defence.<sup>5</sup>

§ 436. **Other Parties.** — Parties standing in other relations of contract have, agreeably to the principles of the common law, been held admissible or not, according as they were interested for the party calling them as witnesses. Thus, on a *scire facias* in a proceeding *in rem*, in which no one was interested as defendant, except as owner of the property against which the lien was sought to be established, a person, who acquired an interest in the premises after a building had been erected, but conveyed his interest in the same before the trial, and who was not a party to the contract, was a competent witness. The fact

<sup>1</sup> Odd Fellows' Hall v. Masser, 24 Penn. 507.

<sup>2</sup> Collins v. Ellis, 21 Wend. (N. Y.) 397; Miner v. Hoyt, 4 Hill (N. Y.), 193; Hoyt v. Miner, 7 Hill (N. Y.), 525.

<sup>3</sup> Carpenter v. Moser, 1 Wis. 238.

<sup>4</sup> Dickinson College v. Church, 1 Watts & S. 462; Church v. The College, 3 Watts & S. 221; Miner v. Hoyt, 4 Hill (N. Y.), 193; contra, Hoyt v. Miner, 7 Hill (N. Y.), 525.

<sup>5</sup> Haworth v. Wallace, 14 Penn. 118.

that he was notified to appear and defend, and the jury was sworn as to him, did not make him a party to the record, or affect his competency.<sup>1</sup> Where a former partner of a dissolved firm is offered as a witness in a suit brought in the name of the firm for the use of an individual member, and he has released his interest, no valid objection can be raised against him.<sup>2</sup> A co-lienor, who seeks to share in a common fund, is admissible for another, his interest being adverse to the party calling him.<sup>3</sup> So, the fact that a person had been a surety in an original contract for the faithful performance of work, which contract had been abandoned and work subsequently resumed under a new one, the surety is released and is an admissible witness in a suit for the work done under the substituted contract.<sup>4</sup> But an indorser of a note, the consideration of which is work done on a building, is not a competent witness for the holder to establish the lien upon the property of the maker, as he is interested to establish the lien.<sup>5</sup> Neither is a terre-tenant of a building against which a lien is filed competent for the defendant in a proceeding to enforce the lien.<sup>6</sup>

<sup>1</sup> *Holden v. Winslow*, 19 Penn. 449.

<sup>2</sup> *Holmes v. Shands*, 26 Miss. 639.

<sup>3</sup> *Power v. McCord*, 36 Ill. 214.

<sup>4</sup> *Kugler v. Wiseman*, 20 Ohio, 361.

<sup>5</sup> *Soule v. Dawes*, 6 Cal. 475.

<sup>6</sup> *Jones v. Shawhan*, 4 Watts & S. 257.



## CHAPTER XL.

## EVIDENCE.

§ 437. **General Rules applicable.** — Mechanics' lien laws do not alter the rules governing the production and competency of testimony, unless specially provided for by statute.<sup>1</sup> It is therefore not proposed to enter into a discussion of the subject of evidence, further than to give the decisions which have been made with special reference to this lien. The first and most important general rule, applicable almost universally, is, that the plaintiff should make proof of every material allegation of his complaint or declaration, and the defendant of every new affirmative fact contained in his plea. As an instance, when the entering of the abstract in a judgment docket, as well as the filing of the account in the clerk's office within the time limited by the statute, is a condition precedent to the attaching of a mechanics' lien, a plaintiff must allege and produce sufficient proof, on a *scire facias* to enforce his lien, that the abstract has been so entered, before verdict and judgment can be rendered in his favor.<sup>2</sup> The *allegata* and *probata* must agree. Thus the contract under which work is performed is usually an essential element in the case, and, when so, must be proved as alleged. A plaintiff cannot declare on a special agreement for work, and abandon or depart from it, and recover on a *quantum meruit*.<sup>3</sup> So a variance between the proof and the contract, as described in a petition for the lien, in the time of payment, will be fatal;<sup>4</sup> or, if the petition states the work was to have been done for a certain price, and by a certain day, and the proof shows an entirely different price and day, the decree will be reversed.<sup>5</sup> So, when a joint lien is filed against the houses of several, the plaintiff cannot mend his case on the trial by proving what lumber has been furnished for each house. This would be contrary to his demand set forth in his *scire facias*, and he cannot be per-

<sup>1</sup> Briggs v. Titus, 7 R. I. 441.

<sup>2</sup> Hicks v. Branton, 21 Ark. 186.

<sup>3</sup> Carroll v. Craine, 9 Ill. 563; McConnell v. Bryant, 38 Ga. 639.

<sup>4</sup> Van Court v. Bushnell, 21 Ill. 624; Roach v. Chapin, 27 Ill. 196.

<sup>5</sup> Stein v. Schultz, 23 Ill. 646.

mitted thus to vary his pretensions.<sup>1</sup> Neither can a plaintiff in an action to foreclose the lien recover for work not stated in his complaint or bill of particulars. He will be confined to his claim therein.<sup>2</sup> But, where the petition alleged a contract in writing, and the proofs showed a contract in writing and partly in parol, it was held that, the contract being set out *in extenso* in the petition, any error in stating its legal effect will be rejected as surplusage.<sup>3</sup> Again, where a claim sets forth that it was for work done and materials furnished in pursuance of a contract, the lien will be sustained by proof that the price of the work was to be ascertained by measurement after its completion.<sup>4</sup> So, a failure to prove that the materials were furnished on the particular days set forth in the bill of particulars is not a fatal defect. It is evident that if it were so held, and a mechanic or material-man tied down to day and date in every particular, he could seldom recover on any of the means of proof known to the common law, and would be forced to rely in all cases on the accuracy and competency of his book of original entries. It is presumed that the evidence would be sufficient if it showed the work was done and materials furnished within the statutory period allowed for filing the lien.<sup>5</sup> A defendant failing to object, on a trial of a mechanics' lien, to evidence, on the ground of variance, waives the objection, and cannot urge the same on appeal for the first time.<sup>6</sup> The plaintiff must prove every fact essential to his recovery, as the ownership of the land, the fact that the building was on the land described, etc., and these facts cannot be proved by the statement and affidavit.<sup>7</sup> Evidence must be given to show when the last work was done in order to prove seasonable filing of the lien.<sup>8</sup> The plaintiff must produce notes of the debtor held by him for the claim sued on, or account for their absence.<sup>9</sup> It is error to admit evidence on a matter not put in issue by the pleadings.<sup>10</sup> Plaintiff worked on defendant's mine under a contractor, who by written contract with defendant was to pay employees a certain per diem. Plaintiff had knowledge of such contract and worked thereunder. Defendant offered in evidence the written contract, which was excluded, but was afterwards permitted to give oral testimony as

<sup>1</sup> Gorgas v. Douglas, 6 Serg. & R. 512.

<sup>2</sup> Lutz v. Ey, 3 Abb. Pr. (N. Y.) 475.

<sup>3</sup> Austin v. Wohler, 5 Bradw. (Ill.) 300.

<sup>4</sup> Miller v. Bedford, 86 Penn. 454.

<sup>5</sup> Haviland v. Pratt, 1 Phila. 364. See *contra*, Milligan v. Hill, 4 Phila. 52; s. c. on appeal, 38 Penn. 237.

<sup>6</sup> Grundeis v. Hartwell, 90 Ill. 324.

<sup>7</sup> [Hutton v. Maines, 68 Iowa, 650,

<sup>8</sup> [McDonald v. Ryan, 39 Minn. 341.]

<sup>9</sup> [Kankakee Coal Co. v. Man. Co., 128 Ill. 627, 629.]

<sup>10</sup> [Brooks v. Blackwell, 76 Mo. 309.]

to the amount the contractor was to pay. Plaintiff's objections to the oral testimony were sustained, but it was not stricken out, and the jury found in accordance with defendant's testimony. Held, that the exclusion of the written contract, although error, did not prejudice defendant.<sup>1</sup> A mechanics' lien need not be proved by a subscribing witness.<sup>2</sup> A witness in the county court who is alive and accessible at the time of trial in the superior court must be produced. His testimony at the first trial will not affect the party who called him, as an admission upon the second trial.<sup>3</sup>

§ 438. **Chancery Rules.** — When the action is expressly declared to be a chancery or other special proceeding, and there are rules of evidence different from those at common law affecting the same, they will be applicable to the enforcement of the lien.<sup>4</sup> If it be a chancery proceeding, an answer to a petition to enforce the lien, so far as the same is responsive thereto, would be proper evidence for the consideration of the jury.<sup>5</sup> Complainants, except they be authorized by statute, cannot deprive defendants of the benefit of their answers under oath by waiving such answers.<sup>6</sup> An admission, however, made by a defendant under oath, in his answer, will be taken most strongly against him on the trial; and he will not be permitted to amend at that stage of the cause by retracting such admission, unless it be upon very satisfactory evidence that he has been deceived or misled, or acted under clear mistake as to the facts.<sup>7</sup> Where the statute requires "all testimony taken or used shall be reduced to writing," etc., and there is no authentication, an appellate court refused to hear a case on stipulation of the respective solicitors, as the action of other courts should not be reviewed and their judgments disturbed, upon records made for them by attorneys in the cause.<sup>8</sup>

§ 439. **Confession by Pleading, etc.** — The mode of proving the allegations of a complaint or declaration under the lien law is ordinarily, as in other actions, by evidence offered at the trial. An exception, however, exists in those cases where no negative pleas are filed, but confession and avoidance is pleaded; the claim itself may be read in evidence by the plaintiff;<sup>9</sup> or where, by special enactment, in consequence of some default on the part

<sup>1</sup> [Rosina v. Trowbridge, 20 Nev. 105.]

<sup>2</sup> [Murphy v. Valk, 30 S. C. 262.]

<sup>3</sup> [McElmurray v. Turner, 86 Ga. 215, 217.]

<sup>4</sup> Kimball v. Cook, 6 Ill. 423.

<sup>5</sup> Garrett v. Stevenson, 8 Ill. 261; 233.

Tracy v. Rogers, 69 Ill. 662.

<sup>6</sup> Ford Gold Mining Co. v. Langford, 1 Colo. 62.

<sup>7</sup> Miller v. Moore, 1 E. D. Smith, 739.

<sup>8</sup> Roberts v. Miller, 31 Mich. 73.

<sup>9</sup> Van Billiard v. Nace, 1 Grant Cas.

of the defendant, the truth of certain facts is presumed. As if a lien creditor, in a suit against the owner, under a statute which requires the contractor to give written notice to the owner of his intention to dispute the claim or arbitrate, and upon neglect "he shall be considered as assenting to the demand," rely exclusively on the contractor's having omitted to give the owner notice, the state of the accounts between the lien creditor and the contractor is of no importance. Whatever that may be, the owner is liable, if he have sufficient funds of the contractor in his hand to pay the claim, if such omission be proved, and cannot himself dispute the accuracy of the account between the creditor and contractor.<sup>1</sup> But neglect of the contractor to dispute an account which is not of such a character as to give the party a lien will not make such account conclusive evidence of the creditor's right to recover against the owner.<sup>2</sup> Where a statute required a petition should be filed in equity, and the respondent "at the next term . . . after filing the petition, should show cause, if any he have, why the lien should not be allowed," without further provision, non-appearance by the respondent at the time when called upon to appear will be regarded as a confession of the lien by the owner of the land.<sup>3</sup>

§ 440. **Relevancy.** — When the claim is disputed, such evidence must be offered by the plaintiff as is legally competent and sufficient to prove the several facts alleged. If the law does not prescribe the kind of testimony necessary for this purpose, it depends upon the ordinary rules of evidence.<sup>4</sup> Its relevancy will be tested as in other civil cases. Evidence was offered that about the time a house against which a lien was filed, and an adjoining one, were commenced, the owner of both said to one of the plaintiffs he wanted them to prime the frames, and see about painting these houses; it was competent to go to the jury, as tending to show that the painting done by the plaintiffs was done under a contract with the owner to do all the painting for the house in question. But evidence that the plaintiffs had painted several other houses for the owner, and in each instance had done all the painting on them, does not tend to show that they had done the work on the house on which they claimed a lien, in pursuance of a contract with the owner to do all the painting on that house, or to do all the painting on all the

<sup>1</sup> *Monteith v. Evans*, 3 Sandf. (N. Y.) 65.

<sup>2</sup> *Burlingame v. Emerson*, 5 R. I. 62.

<sup>3</sup> *Burst v. Jackson*, 10 Barb. (N. Y.) 304.

<sup>4</sup> *Church v. Davis*, 9 Watts (Penn.), 219.

houses built by the owner, and is inadmissible for such purpose.<sup>1</sup> Under a provision that, "upon questions arising between different creditors, no preference shall be given to him whose contract was first made," it is no error for a court, upon the hearing, to reject evidence offered generally to show how far work on the building had progressed at the date of each claimant's contract, where there was nothing offered to show how such evidence could become material.<sup>2</sup> So, where the only evidence to support a lien is a note of the owner, which does not refer to the consideration for which it was given, there is not sufficient evidence to prove a lien for materials furnished.<sup>3</sup> If it is shown that S. has erected and occupies a building, it is *prima facie* evidence of ownership.<sup>4</sup>

§ 441. **Evidence of Value of Work. — Identity of Premises. — Terms of Contract, etc.** — The proof of the value of the work performed is always an important element.<sup>5</sup> Accordingly an owner may, in an action against him to enforce a lien by a sub-contractor, give evidence that the services rendered by the plaintiff for the contractor are not worth the amount charged.<sup>6</sup> This proof may be made by the testimony of persons acquainted with the quantity and quality of the work done, and the value of such work in general, and that the value of such work equals or exceeds the amount claimed.<sup>7</sup> The opposite party has, however, the right, on cross-examination, to ascertain the rates upon which they proceed in making their estimates, and to test their judgment upon the subject concerning which they have been called to give an opinion.<sup>8</sup> When the work or materials are not furnished under special contract, the most satisfactory evidence to prove their quantity and value is the testimony of a measurer;<sup>9</sup> by which means is best ascertained the value of the work as expended by the mechanic, and the materials when furnished by the material-man. It is not their value when conjoined and placed in their new state, as a building, which governs the amount to be recovered, whether, by a fortunate employment or otherwise, they increase or decrease in value; and therefore evidence of the value of a house after it is finished cannot be given to prove the value of the labor performed or materials furnished in its construction.<sup>10</sup> Neither is a

<sup>1</sup> Miller v. Barroll, 14 Md. 173.

<sup>2</sup> Wing v. Carr, 86 Ill. 347.

<sup>3</sup> Finch v. Redding, 4 B. Mon. (Ky.)

87. <sup>4</sup> [Lewis v. Saylors, 73 Iowa, 504.]

<sup>5</sup> Donnelly v. Libby, 1 Sweeny (N. Y.),

<sup>6</sup> Merritt v. Pearson, 58 Ind. 385.

<sup>7</sup> Haviland v. Pratt, 1 Phila. 364.

<sup>8</sup> Gilman v. Gard, 29 Ind. 291.

<sup>9</sup> Thorn v. Heugh, 1 Phila. 322.

<sup>10</sup> Associates of Jersey v. Davison, 5 Dutch. (N. J.) 415.

person employed to perform work entitled to recover what he pays his workmen, with a percentage, but *quantum meruit*, and as to the materials furnished, *quantum valebant*; and a defendant as well as plaintiff may show, by experts who have examined such work and materials, the true amount and value thereof. This frequently is the only practical mode of proof available to the defendant, and is valuable in the prevention or detection of fraud.<sup>1</sup> Any other evidence which legitimately throws light on the subject of value may be resorted to. Thus, where work was commenced under a building contract, and the owner subsequently gave up the project, but afterwards resumed it upon a second contract in which an increased price was to be paid, proportionate to the intermediate rise in wages and materials, a lien was filed for this work and labor done under the subsequent agreement; to prove the value of which the original contract was competent evidence. To prove the increased cost of the work, it was also proper to inquire of witnesses generally the difference in the price of wages and materials in the summer months, when the work was stopped, and the fall and winter months, when completed. This question need not be confined to the particular year when the work was done, if it be in proof that that year did not differ from others. A difference in price might also have been established by way of per centum.<sup>2</sup> If it can be made out from the whole case, putting all parts of the evidence and pleadings together, that the labor was performed on the premises described in the petition, it is sufficient on that point. It is enough if the evidence in connection with the pleadings identifies the building.<sup>3</sup> Proof of the contract and its performance is necessary to enforce a lien, and the evidence must be clear and definite.<sup>4</sup> In an action upon a mechanics' lien claim, it was not error to permit the lien claim filed in the case, and containing a statement of the particulars of the plaintiff's demand, to go to the jury, when, upon the trial, it was shown to the witness who ordered the goods, and who testified that it was a correct statement of the goods furnished pursuant to his order.<sup>5</sup> Evidence that the amount of lumber claimed to have been furnished was not "required" for the construction of the building is inadmissible.<sup>6</sup> It must be found that the amount claimed was due the plaintiff the very day the suit was

<sup>1</sup> Hauptman v. Catlin, 1 E. D. Smith, 729.

<sup>2</sup> Kugler v. Wiseman, 20 Ohio, 361.

<sup>3</sup> [Pease v. Thompson, 67 Iowa, 70.]

<sup>4</sup> [Gunter v. Bennett, 72 Md. 384.]

<sup>5</sup> [Mooney v. Peck, 49 N. J. L. 232, 233.]

<sup>6</sup> [Woolsey v. Bohn, 41 Minn. 235.]

brought, and a finding that it was due on some prior day named, is insufficient to sustain judgment.<sup>1</sup>

§ 442. **Original Entries.** — Books of original entries are admissible to prove that the materials for which suit is brought were furnished for the particular building which is the subject of the lien,<sup>2</sup> although kept in ledger form, if accompanied by parol proof that the entries were fairly made and the articles charged were delivered.<sup>3</sup> They should be made according to the nature and usages in the particular business.<sup>4</sup> It is essential that entries should be daily memoranda to render them admissible. Hence a general entry as an aggregate charge or a general result, is inadmissible. And in one case, it was held that they were admissible only to prove the performance and delivery of the work done within the shop, and not that done outside, or on the premises of the party charged.<sup>5</sup> These charges are neither conclusive for or against the party making them. Thus, where it was important that the charges should have been made against the contractor, on the credit of the building, and the materials were charged against the contractor individually, it was competent to show that they were furnished on the credit of the particular building against which the lien was filed,<sup>6</sup> as they were not the sole test of the building to be charged.<sup>7</sup> So, if the materials be entered as against the owner, instead of the contractor, and it be shown that they were used by the latter in the construction of the building, and the money was retained by the owner to pay for them, they are admissible to sustain the lien.<sup>8</sup> They are, when introduced, only *prima facie* evidence against the defendant of the amount and value of the materials furnished.<sup>9</sup> In another case, however, it has been held that charges in a claimant's books are no evidence of either the quantity or time of delivery.<sup>10</sup>

§ 443. **Best Evidence.** — The introduction of parol evidence in support of the lien is likewise governed by the general rules for the admission of testimony. Whatever is the subject of investigation, and as to which no better testimony in its technical sense exists, may be proved by parol. The delivery of materials, performance of work, or other execution of the contract, is always

<sup>1</sup> [Bewick v. Muir, 83 Cal. 368.]

<sup>2</sup> M'Mullin v. Gilbert, 2 Whart. (Penn.)

277.

<sup>3</sup> Rehner v. Zeigler, 3 Watts & S. 258.

<sup>4</sup> Singerly v. Doerr, 62 Penn. 9.

<sup>5</sup> St. Phillip's Church *ads.* White, 2 McMull. (S. C.) 306.

<sup>6</sup> Kelly v. Brown, 20 Penn. 446.

<sup>7</sup> Church v. Davis, 9 Watts (Penn.),

304.

<sup>8</sup> Barbier v. Smith, 38 Penn. 296.

<sup>9</sup> Hauptman v. Catlin, 1 E. D. Smith,

<sup>10</sup> Ortwine v. Caskey, 43 Md. 134.

susceptible of proof by such means;<sup>1</sup> also the character of the structure erected, and the purposes to which it was intended to be devoted.<sup>2</sup> But, if the offer be in violation of the rules of evidence, it is inadmissible. As where a contract to erect buildings, made on one part in the name of three, was signed by but one, who did not assume to act for the others, and was thus recorded, parol evidence is inadmissible to show that this contract was also the contract of the other two named, and thereby created a lien upon their land.<sup>3</sup> But, where a mechanic in accepting a mortgage expressed in the assignment that it should not be a waiver of the lien, it was held nevertheless that he might show that it was also agreed that no lien proceedings should be instituted until maturity of the mortgage.<sup>4</sup> In order to sustain a mechanics' lien it is not necessary that the defendant's ownership be proved by the best evidence, or by such as would be admissible in an action to try title to real estate. Evidence that the work or materials were furnished in and about the building used and occupied by the defendant as a manufacturing establishment, and that the property was assessed for taxes against the defendant, is sufficient on the question of interest in the property to be charged.<sup>5</sup>

§ 443 *a*. **Proof of Notice of Lien.** — Unless the statute authorizes it, the notice of lien filed in the county clerk's office cannot be proved by a certified copy thereof from such office. The certificate at best can verify nothing but the paper itself and what appeared upon it. The clerk cannot certify an independent fact not appearing on its face.<sup>6</sup> But a copy of the notice of claim required to be filed in a county clerk's office, when certified by the deputy clerk, under the county seal, is entitled to be used in the same manner as if certified by the clerk himself. It is in effect the act of the clerk by his deputy. A copy of notice in which the signatures are not proved or acknowledged is not, though certified by the county clerk, admissible as evidence of the due filing of the proper notice of lien.<sup>7</sup> Yet, in another case, it has been held that the record of the notice of intention to hold a lien, is competent evidence in an action to enforce a mechanics' lien, to prove its contents, and when it was filed.<sup>8</sup>

<sup>1</sup> Church v. Davis, 9 Watts (Penn.), 304.

<sup>2</sup> Munger v. Silsbee, 64 Penn. 454.

<sup>3</sup> Conner v. Lewis, 16 Me. 268.

<sup>4</sup> Barclay v. Wainwright, 86 Penn. 191.

<sup>5</sup> [Rohan Bros. M'fg Co. v. St. L. Malleable Iron Co., 34 Mo. App. 157.]

<sup>6</sup> Sampson v. Buffalo, 4 Thomp. & C. (N. Y.) 600.

<sup>7</sup> Jennings v. Newman, 52 How. Pr. (N. Y.) 282.

<sup>8</sup> Merritt v. Pearson, 58 Ind. 385.



§ 444. **Declarations of Agent.**—The rule is laid down, that when the acts of an agent will bind his principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*. This principle is applicable to mechanics' lien laws.<sup>1</sup> Accordingly the admissions of a contractor who constructed a building, that lumber was furnished on the credit of the building made at the time of its purchase and a part of the transaction, are admissible on *scire facias* to enforce the lien as against the owner.<sup>2</sup> They are then part of the *res gestæ*.<sup>3</sup> But the admissions and declarations of an agent in reference to a matter upon which he has no right to act cannot affect the principal. As if the sole business of an architect be to draw contracts, make estimates of work done, and to pay over money on these estimates, but he has no authority to contract for or buy any materials on behalf of his principal, then it is obvious that any declarations or admissions made by him on a matter where he has no right to act cannot bind his principal. It is not proper in such case to instruct the jury that, if they should find that the architect was the agent of the defendant, the owner, then his admissions and declarations would bind the defendant; and if he were acting for the defendant as his agent about the building, although his authority might not expressly extend to the purchasing of materials, still, if the vendor believed he was authorized to purchase, the defendant was liable.<sup>4</sup> So, in a suit against the owner of houses by a lumber-merchant for lumber furnished to the contractor, evidence that, at a settlement between the contractor and owner the contractor admitted the owner's books to be correct, is inadmissible.<sup>5</sup> Again, the admissions by a contractor acknowledging the correctness of an account rendered for materials furnished are not evidence against the owner of the building.<sup>6</sup>

§ 445. **Declarations of Prior Owners.**—The admissions and declarations of prior owners, while owner, are ordinarily admissible as evidence against his grantee, or others claiming through him. A contract under which the materials were furnished or work done in the erection of a building has been proved in this manner.<sup>7</sup> But the admissions of a contractor who was inter-

<sup>1</sup> McDonnell v. Dodge, 10 Wis. 106.

<sup>2</sup> Dickinson College v. Church, 1 Watts & S. 462.

<sup>3</sup> Treusch v. Shryock, 51 Md. 163.

<sup>4</sup> McDonnell v. Dodge, 10 Wis. 106.

<sup>5</sup> Landis v. Rover, 59 Penn. 95.

<sup>6</sup> Philibert v. Schmidt, 57 Mo. 211; Deardorff v. Everhartt, 74 Mo. 37; Treusch v. Shryock, 51 Md. 163.

<sup>7</sup> Edwards v. Derrickson, 4 Dutch. (N. J.) 39.

ested in property, made after he has sold his interest, cannot give a lien any effect against his grantee.<sup>1</sup> Neither will the admissions of an owner, who has mortgaged his property, that the claim of the mechanic was correct, be admissible against the mortgagee. If such were the case, the mortgage would afford very little security for the debt intended to be secured thereby, for the mortgagor could by admissions create liens on the mortgaged premises, and thereby lessen or destroy the value of the mortgage. The mortgagor can by no acknowledgment subsequent to the mortgage prejudice the interest of the mortgagee.<sup>2</sup> The declarations, however, of the owner of the building, that he had retained money to discharge the liens, are evidence against himself, on a *scire facias* brought by a person who performed labor in the building.<sup>3</sup>

<sup>1</sup> Howard v. Veazie, 3 Gray (Mass.), 233.

<sup>2</sup> Carson v. White, 6 Gill (Md.), 17.

<sup>3</sup> Lewis v. Morgan, 11 Serg. & R. 234.

## CHAPTER XLI.

## JUDGMENT AND DECREE.

§ 446. **Nature of the Judgment.** — The nature and effect of the judgment on a mechanics' lien necessarily depends upon the provisions of the statute creating the remedy. Ordinarily the lien of the mechanic exists independently of and prior to the judgment. In this it differs from the lien of a judgment on contracts or torts. When such is the case, the effect of the judgment is simply to determine the amount of the lien and direct a sale for its satisfaction,<sup>1</sup>—a judicial determination of the extent and validity of the lien, relating back and having the effect of an encumbrance from the commencement of the work or filing of notice of lien, as may be provided by law,<sup>2</sup> and any intermediate transfer or surrender of the title cannot destroy or affect the lien.<sup>3</sup> If the law declares "the judgment is to be the same as in personal actions for the recovery of debts," it will have all the force and potency of a common-law judgment.<sup>4</sup> Yet, where a statute provided for a stay of execution "on all decrees for the sale of mortgaged premises" it was held not to include mechanics' liens.<sup>5</sup> A lien law is not unconstitutional because the judgment operates *in personam* as well as *in rem*. It is sufficient if the statute authorize it; and it is never a ground of objection to the validity of a remedial statute that the remedy it provides is ample and complete.<sup>6</sup> But without some such legislative authority, and especially in those States where the lien is only against the interest of the owner in the particular property improved, neither the lien nor the judgment establishing it will be considered as bearing any resemblance to a general judgment; so that although there may be a general act limiting judgments to five years, yet if there be not some further expression to show that

<sup>1</sup> Freeman v. Cram, 3 Comst. (N. Y.) 308; Grant v. Vandercook, 57 Barb. (N. Y.) 165.

<sup>2</sup> Paine v. Bonney, 6 Abb. Pr. (N. Y.) 101; s. c. 4 E. D. Smith (N. Y.), 734.

<sup>3</sup> Allen v. Sales, 56 Mo. 28.

<sup>4</sup> Dean v. Pyncheon, 3 Chandler (Wis.), 9.

<sup>5</sup> Paine v. Putnam, 10 Neb. 588; Arrington v. Wittenberg, 11 Neb. 285.

<sup>6</sup> Blauvelt v. Woodworth, 31 N. Y. 285.

a mechanics' lien is subject to the same limitation, it will be of indefinite duration.<sup>1</sup> When the enforcement of the lien is thus a proceeding *in rem* the judgment can only be against the right, title, and interest in the premises of the owner;<sup>2</sup> and unless the person proceeded against is the owner, there can be no lien, and if there be no lien there can be no judgment,<sup>3</sup> as the judgment in such cases is designed alone to enforce the lien, and is wholly unauthorized if the lien fail.<sup>4</sup> So, where the statute only contemplates a judgment when there is a lien, and it is found that there is no lien, it is error to enter up a decree or judgment for money for a part of the claim.<sup>5</sup>

§ 447. **When Judgment is in rem.**<sup>6</sup> — When the judgment under a mechanics' lien law is personal, it is not a proceeding *in rem*, like claims founded on the building and repair of ships.<sup>7</sup> No uniformity seems to exist among the several systems of lien as to the extent of liability of the owner of premises, and consequently as to whether the judgment is *in rem* alone, establishing the lien, or *in personam*, for general liability under the contract. To determine in what manner the judgment operates, recourse must be had to the act authorizing the lien, and the scope of the judgment therein provided. Thus, where a lien was given "for the value of such labor and materials upon such house, etc., and upon the lot of land upon which the same stands, to the extent of the right, title, and interest at that time existing of such owner," etc., and no provision was made for the recovery on the contract, the judgment had to be special against his interest in the property, and not against the owner generally, even though the claim arose directly upon the contract between the owner and his immediate contractor, and the fact of indebtedness to the latter had been put in issue, and determined in the trial, as well as the existence of the lien.<sup>8</sup> If the transcript, docket, and execution of the judgment, and the judgment itself, were in the form employed in ordinary personal actions, and not special, in directing the sale of the interest of the owner they would be vacated on motion.<sup>9</sup> For although a statute gives a

<sup>1</sup> Knorr v. Elliott, 5 Serg. & R. (Penn) 49.

<sup>2</sup> Quimby v. Sloan, 2 E. D. Smith, 594.

<sup>3</sup> Copley v. O'Neil, 39 How. Pr. (N. Y) 41.

<sup>4</sup> Grant v. Vandercook, 8 Abb. Pr. N. S. (N. Y.) 455.

<sup>5</sup> Barnard v. McKenzie, 4 Colo. 251; Hart v. Mullen, Id. 512.

<sup>6</sup> This section was cited with approbation in Lawton v. Case, 73 Ind. 63.

<sup>7</sup> Capelle v. Baker, 3 Houst. (Del.) 344.

<sup>8</sup> Althause v. Warren, 2 E. D. Smith, 657.

<sup>9</sup> Lenox v. Trustees of Yorkville Baptist Church, 2 E. D. Smith, 673.

lien on a building for work done, yet this alone does not authorize a general judgment against the owner.<sup>1</sup> So the fact that a sub-contractor is authorized to fix a lien on the land of an owner does not justify in itself the recovery of a general judgment *in personam* against the owner.<sup>2</sup> When personal judgments are authorized against owners, they will be found to be in favor of mechanics and material-men who have dealt directly with them; and in addition to their right of lien, there exists an indebtedness arising out of contract. Sub-contractors, and material-men furnishing materials to contractors, are confined at most to a lien on the premises, and no general judgment for their indebtedness can be entered against the owner. So, where one of the defendants in a proceeding to foreclose a mechanics' lien having been made a party because he was alleged to be in possession, claiming by purchase, it was held to be error to enter judgment against him personally for the debt. It will be thus seen that a judgment *in personam* is never entered unless authorized by statute, and this is never done unless there exists privity of contract between the parties litigant.<sup>3</sup> The final decree under a statute which gives "every person who shall by contract, express or implied, with the owner," etc., a lien, ought expressly to adjudge the existence of contract relation between the parties.<sup>4</sup> It has been expressly held that no personal judgment can be obtained against the owner of the building, who was not a party to the contract for the work or materials without precedent statute;<sup>5</sup> and no personal decree can be passed against subsequent purchasers of an estate subject to a mechanics' lien. The lien attaches only to the property, and can be enforced against them only by sale of the property.<sup>6</sup> Purchasers taking subject to a lien are not personally liable thereon, and an agreement among themselves to pay their respective shares toward clearing off incumbrances creates no obligation to the lienor.<sup>7</sup> No judgment *in rem* in a lien suit against the owner, can be rendered where no general notice of the suit has been given.<sup>8</sup>

§ 448. **When Personal.** — When the owner or contractor is responsible under the contract, in addition to the land being charged with the lien, and where the statute confers jurisdiction on the court to give judgment on the indebtedness arising out of the contract, personal judgment may be rendered against the

<sup>1</sup> Richardson v. George, 34 Mo. 104.

<sup>2</sup> Waldroff v. Scott, 46 Tex. 1.

<sup>3</sup> Loring v. Flora, 24 Ark. 151; Barber v. Reynolds, 44 Cal. 520.

<sup>4</sup> Willard v. Magoon, 30 Mich. 273.

<sup>5</sup> Schmeiding v. Ewing, 57 Mo. 78.

<sup>6</sup> Work v. Hall, 79 Ill. 197.

<sup>7</sup> [Condict v. Flower, 106 Ill. 107, 119.]

<sup>8</sup> [Martin v. Darling, 78 Me. 78.]

defendant debtor, as in *assumpsit*,<sup>1</sup> although the plaintiff in such suit may have failed to establish his lien.<sup>2</sup> As where the court had jurisdiction, and in a suit instituted to enforce a mechanics' lien the plaintiff failed to show the existence of a lien in his favor, he will, nevertheless, if the pleadings and the evidence warrant, be entitled to a general judgment on the indebtedness.<sup>3</sup> Where the law providing for this lien enacts "that the pleadings, practice, and process, and other proceedings designed to enforce liens, shall be the same as in ordinary civil actions," the ordinary common counts of the common law may be joined with a special one for the enforcement of the lien. So when a complaint states the facts which show both a money demand due in debt or *assumpsit* and a lien, and the proof shows the correctness of the amount claimed, but fails to sustain the lien under the statute, there is no reason why a personal judgment may not be rendered, even though the lien is not established by the judgment.<sup>4</sup> But where service on the contractor is by publication only, a personal judgment cannot be rendered against him.<sup>5</sup> The judgment against the owner's property in a mechanics' lien case is merely incidental to a personal judgment against some one, who must be either the owner, or must stand in some contract relation with him, or with some contractor under him.<sup>6</sup> So where the statute gives a lien, and also a personal liability of the owner, either or both may be acquired.<sup>7</sup> But a statute which simply directs that the judgment shall be for the sale of the interest of the owner, and judgment against the contractor, a personal judgment against both is erroneous, and will be reversed, even upon the contractor's appeal. Yet if the contractor and owner be one person, a liberal construction of such a law would allow a personal judgment against him for the amount of the indebtedness that might remain after a sale of his interest in the premises affected by the lien.<sup>8</sup> This right to enter a personal judgment in the lien proceeding is the grant of express enactment, and without it, if the lien has expired or failed, no

<sup>1</sup> *Maltby v. Greene*, 1 Keyes (N. Y.), 548.

<sup>2</sup> *Haight v. Schnuck*, 6 Kan. 192; *Gillespie v. Lovell*, 7 Kan. 419; *Williams v. Porter*, 51 Mo. 441; [*Smith v. Gill*, 37 Minn. 455; *Cannon v. Williams*, 14 Colo. 22. Dissent by Justice Hoyt, 26. If materials are furnished towards the erection of a building, although not used in it, the price of them may be recovered in an action on a mechanics' claim against

the building. *Miller v. Blessing*, 17 Phil. 307; *Moritz v. Splitt*, 55 Wis. 441.]

<sup>3</sup> *Patrick v. Abeles*, 27 Mo. 184.

<sup>4</sup> [*Bedsole v. Peters*, 79 Ala. 133; *Phillips*, § 448, cited with approval.]

<sup>5</sup> [*Bombeck v. Devorss*, 19 Mo. App. 38.]

<sup>6</sup> [*Steinkamper v. McManus*, 26 Mo. App. 51.]

<sup>7</sup> *Crawford v. Crockett*, 55 Ind. 220.

<sup>8</sup> *Dennistoun v. McAllister*, 4 E. D. Smith, 729.

judgment whatever can be rendered for the claimant. He cannot convert his proceedings into an action for the recovery of money upon a personal contract, and insist upon the defendant's personal liability.<sup>1</sup> The Illinois law does not contemplate a personal decree alone in a lien suit in case the lien fails. The decree of lien, however, may operate as a personal judgment in respect to a deficiency after sale of the property.<sup>2</sup> In some States the lien is incident to a personal judgment.<sup>3</sup> No personal judgment when lien not established.<sup>4</sup> In an action before a justice on a mechanics' lien where there is a dismissal as to the lien, there can be no judgment on the general indebtedness.<sup>5</sup> So, if no lien ever existed, then no judgment can be rendered against the owner, as, the proceeding being statutory, it can only be resorted to in a case falling within the statute, that is, where a mechanics' lien exists.<sup>6</sup> But, where the statute authorizes it, a personal judgment may be recovered by a claimant, although the lien itself has expired by lapse of time,<sup>7</sup> during the pendency of an action brought to foreclose it. Again, where there is a judgment *in personam* and one *in rem* condemning the land, and the latter is erroneous, the former on appeal if correct may be affirmed, and the latter remanded for modification.<sup>8</sup> The legislature may consolidate the proceeding to enforce the lien with the remedy on the contract, and authorize personal judgments therein against all persons beneficially or equitably interested in the property and bound by the contract.<sup>9</sup> Where the suit of a sub-contractor is personal against the owner and principal contractor, and not against the property, the judgment must be personal, as in other cases, and it can be enforced only by a general execution.<sup>10</sup> A personal judgment against the contractors is not necessary to sustain the lien of a material-man.<sup>11</sup> In South Carolina it is error in a lien suit to give a personal judgment for the deficiency that may exist after sale of the property. The extent of the act is the enforcement of the lien.<sup>12</sup>

<sup>1</sup> Grant v. Vandercook, 57 Barb. (N.Y.) 165.

<sup>2</sup> [Green v. Sprague, 120 Ill. 416, 419; 13 Bradw. 476; Martin v. Swift, 120 Ill. 488; O'Brien v. Graham, 33 Ill. App. 546.]

<sup>3</sup> [Oakley v. Van Noppen, 95 N. C. 60.]

<sup>4</sup> [Eisenbers v. Wakeman, 3 Wash. 534.]

<sup>5</sup> [Hydraulic Press-Brick Co. v. Zepfenfeld, 9 Mo. App. 595.]

<sup>6</sup> Weyer v. Beach, 79 N. Y. 409; Kelsey v. Rourke, 50 How. Pr. (N. Y.) 315.

<sup>7</sup> Glacius v. Black, 11 N. Y. Supreme Ct. 91; s. c. 67 N. Y. 563; Burroughs v. Fosternan, 75 N. Y. 567; McGraw v. Godfrey, 14 Abb. Pr. n. s. 397.

<sup>8</sup> White v. Chaffin, 32 Ark. 74.

<sup>9</sup> Hallahan v. Herbert, 11 Abb. Pr. n. s. 326.

<sup>10</sup> Baptist Church v. Andrews, 87 Ill. 172.

<sup>11</sup> [Russ Lumber Co. v. Garrettson, 87 Cal. 589.]

<sup>12</sup> [Johnson v. Frazee, 20 S. C. 500.]

§ 449. **Form of Judgment must follow Statute.**<sup>1</sup>—The enforcement of a mechanics' lien being a statutory proceeding, a rule of universal application is, that the judgment must follow the statute.<sup>2</sup> Thus, if it explicitly and peremptorily require that the judgment shall direct a sale of the interest of the owner in the premises affected by the lien, a judgment in favor of a subcontractor, or employee of the contractor, against the owner personally is erroneous.<sup>3</sup> The judgment should direct only a sale of the right, title, and interest of the owner in the house and lot, and that the proceeds be applied to the satisfaction of the claim, and, when authorized by law, that the claimant have execution against the contractor for the deficiency, if any, for the residue of such judgment.<sup>4</sup> The judgment on a mechanics' lien must be rendered in pursuance of the statute. Accordingly, where the law contemplated a judgment *in rem*, and only an ordinary judgment *in personam*, such as is rendered in actions *ex contractu* was entered, it was held that no lien was established.<sup>5</sup> Again, where the statute does not contemplate a personal decree without the sale of property, and no sale can be ordered in consequence of the property being exempt from sale, no personal decree can be passed for the money due.<sup>6</sup> So, where a statute provides that the "right, title, and interest of the person owning such house in and to the land upon which the same is situated" shall be subject to the debts contracted for work, the judgment should not direct a sale of the land, or any part of it, but, in the language of the law, only the interest of the party.<sup>7</sup> Such a judgment would be erroneous and cause of reversal.<sup>8</sup> The execution should also be in conformity to the judgment establishing the lien. Thus, an execution against and sale of both a building and lot, where the judgment was against the building alone, are void.<sup>9</sup> In like manner, the judgment should follow the verdict of the jury; and if it should fail to find a lien when that question is properly submitted to them, it would be reversible error for the court in its judgment to establish one.<sup>10</sup> No special form of judgment is requisite. It is sufficient if it in substance be warranted by the law. Judgments are now tested by matters

<sup>1</sup> This section was cited with approbation in *Lawton v. Case*, 73 Ind. 63.

<sup>2</sup> *Meehan v. Williams*, 36 How. Pr. (N. Y.) 73; 20 N. Y. 247.

<sup>3</sup> *Cox v. Broderick*, 4 E. D. Smith, 721.

<sup>4</sup> *Eagleson v. Clark*, 2 E. D. Smith, 644.

<sup>6</sup> [*Porter v. Miles*, 67 Ala. 130.]

<sup>6</sup> *Bouton v. McDonough Co.*, 84 Ill. 396; *Quinn v. Allen*, 85 Ill. 39.

<sup>7</sup> *Dennistoun v. McAllister*, 4 E. D. Smith, 729.

<sup>8</sup> *Grant v. Vandercook*, 57 Barb. (N. Y.) 165.

<sup>9</sup> *Hallahan v. Herbert*, 11 Abb. Pr. N. S. 326.

<sup>10</sup> *Meehan v. Williams*, 36 How. Pr.



of substance, rather than by the measure of any particular draft or form.<sup>1</sup> Thus, where the enactment was, that "the court may, by the judgment, direct a sale of the land and building for the satisfaction of the lien and costs," and the judgment was in the usual form, for the amount of the finding and costs, and then followed an order that the property described in the complaint was liable to pay and satisfy the said judgment, and that, unless it was paid, said property be sold, as other lands are sold on execution, there was held to be no error in the form of the judgment.<sup>2</sup> A judgment in a mechanics' lien case, which is against the debtor defendants, and then directs, if no property of such debtors sufficient to satisfy said debts and costs be found, that the same or the residue thereof be levied upon and made out of the real estate therein described, is sufficient.<sup>3</sup> A judgment to enforce a mechanics' lien upon specific property must contain a general description of such property, and an execution thereon must direct that such property shall first be sold to satisfy the judgment.<sup>4</sup> The judgment may properly provide for a sale of the premises in behalf of all lienors when made parties, and for the payment to them of their liens according to their rights respectively.<sup>5</sup> But an order of sale of the whole property to satisfy the liens of A., B., and C., when C.'s lien is upon a part of the property only, is a void order.<sup>6</sup> The relief granted cannot be greater than the allegations of the bill.<sup>7</sup> No relief can be granted but such as could be adjudged upon the complaint. If that does not ask for a lien, none can be decreed, although the right to one may appear in the course of the trial.<sup>8</sup> But an order in a judgment for the foreclosure of a lien, that after the confirmation of the sale judgment be rendered for the deficiency, is proper under the prayer for general relief, though not specially demanded in the complaint; or the complaint may be treated as amended in that respect to conform to the order.<sup>9</sup> Where in an action to enforce a lien the defendant appeared and answered, the fact that the judgment directs that if there is a deficiency after

(N. Y.) 73; 20 N. Y. 247. [It is error to adjudge a lien without a finding by the jury that the plaintiff is entitled to one. *Brooks v. Blackwell*, 76 Mo. 309.]

<sup>1</sup> [Farley Bros. v. Cammann, 48 Mo. App. 168.]

<sup>2</sup> *Cox v. Broderick*, 4 E. D. Smith, 721.

<sup>3</sup> [Fink v. Remick, 33 Mo. App. 624.]

<sup>4</sup> [McMillan v. Williams, 109 N. C. 252.]

<sup>5</sup> [Kenney v. Apgar, 93 N. Y. 539.]

<sup>6</sup> [Bassick M. Co. v. Schoolfield, 10 Colo. 46.]

<sup>7</sup> [Seiler v. Schaefer, 40 Ill. App. 74.]

<sup>8</sup> [Cuppy v. O'Shaughnessy, 78 Ind. 245, 248.]

<sup>9</sup> [Huse v. Washburn, 59 Wis. 414.]

the sale of the property, a personal judgment may be entered therefor against the defendant, will not work a reversal, although such personal judgment was not prayed for in the complaint.<sup>1</sup> The chancery rule that the record must show on its face the facts necessary to support the decree does not apply to a statutory proceeding to enforce a lien.<sup>2</sup> As a rule real property of value should be sold on a reasonable credit.<sup>3</sup> But it is proper to order a sale for cash sufficient to pay the lien (the rest of the price being on credit), where the amount of the lien is but a small part of the value of the property.<sup>4</sup>

§ 450. **Distribution of Proceeds.**—It is the policy of most of the statutes to call upon all mechanics' lien claimants to intervene and establish their claims in a proceeding which may be brought by one claimant. This seems to be necessary in order to carry out any principle of equality among the various claimants; otherwise, the proceeds of sale might be paid to one, or distributed to a few, instead of, when a deficiency exists, being apportioned equally among all. The statute in such cases usually dispenses with formal intervention on the part of other lien claimants who desire to come in.<sup>5</sup> Provision is, also, generally made for the judgment or decree to distribute the proceeds. Such has been held to be the case where the words of the law are that "judgments may be enforced by an execution on the property on which the lien is adjudged, and the proceeds distributed as ordered by such judgment." A judgment thereunder, directing the sale of the premises under execution, and providing the manner in which the proceeds shall be distributed, is in strict conformity thereto.<sup>6</sup> Again, where "all persons interested in the subject-matter of the suit, or in the premises sought to be sold, may, on application, become parties at any time before final judgment, and the court, upon the trial of causes, shall ascertain the amount due each creditor, and shall direct the application of the proceeds of sales to be made to each in proportion to their several amounts," it is correct practice not to render a decree for the sale of the property, when there are several lien claimants, until all of their rights are found and determined.<sup>7</sup> It is improper to find the amount due one claimant, and decree a sale, without passing upon the rights of other claimants who have been made parties, and who may be entitled

<sup>1</sup> [Edleman v. Kidd, 65 Tex. 18.]

<sup>2</sup> [Drennan v. Huskey, 31 Ill. App. 209.]

<sup>3</sup> [Pairo v. Bethell, 75 Va. 825, 833.]

<sup>4</sup> [Lester v. Fedigo, 84 Va. 309, 312.]

<sup>5</sup> Hunter v. Truckee Lodge, 14 Nev. 24.

<sup>6</sup> Meehan v. Williams, 2 Daly (N. Y.), 367.

<sup>7</sup> Martin v. Eversal, 36 Ill. 222.

*pro rata* to the proceeds.<sup>1</sup> So, if some of the encumbrances be prior and some junior to the mechanics' liens, the decree should declare the order of their payment.<sup>2</sup> When the suit is substantially a chancery proceeding, or the court has jurisdiction of the fund, or the statute contemplates that all persons in interest shall be made parties, it is the duty of the court to adjudicate upon the right of all parties, and direct the application of the proceeds of the sale to be made to each in proportion to their several amounts, and that the sale may convey an unclouded title.<sup>3</sup> It has been said that it is well settled that where there are conflicting claims to priority of payment out of the proceeds of land about to be sold to satisfy the liens upon it, the court, in order to prevent the danger of sacrificing the property by discouraging creditors from bidding, should determine the priorities; and it is error merely to decree a sale, and direct the proceeds to be brought into court.<sup>4</sup> But where the petition against two parties sought a discovery of their interests, and neither answered or filed any defence, and, in consequence, defaults were entered against them, the decree is not erroneous because it did not state the respective interests of the parties. If a cloud be thus cast upon the title of a party who has neglected to make a discovery of his interest, he must bear the consequences of his own laches.<sup>5</sup> This requirement, which makes it obligatory on the court to distribute the proceeds, does not render it necessary that the decree should determine to whom the surplus, if any, should be paid. The surplus would still remain under the control of the court, and might by a subsequent order be directed to be paid over to the party who should show himself entitled to it.<sup>6</sup> Again, where all persons in interest are to be made parties, a decree ordering the payment to a mere lien creditor of the entire surplus proceeds after satisfying other lien creditors is erroneous. The surplus belongs to the owner. He should be ascertained, and it be ordered to be paid over to him. The fact that there was evidence tending to show that the property was not worth enough to satisfy the liens will not change this rule. What the property will bring at a sale cannot be known judicially, until a sale is made.<sup>7</sup> So, where there is a subsequent mortgage, the decree should direct that the surplus

<sup>1</sup> *Power v. McCord*, Id. 214.

<sup>2</sup> *Croskey v. Corey*, 48 Ill. 442.

<sup>3</sup> *Ogle v. Murray*, 3 Bradw. (Ill.) 343; *Newhall v. Kastens*, 70 Ill. 156; *Miller v. Ticknor*, 7 Bradw. (Ill.) 393.

<sup>4</sup> *Iaeger v. Bossieux*, 15 Gratt. (Va.) 83.

<sup>5</sup> *Gould v. Garrison*, 48 Ill. 258.

<sup>6</sup> *Kelly v. Chapman*, 13 Ill. 530.

<sup>7</sup> *Phoenix Mut. Ins. Co. v. Batchen*, 6 Bradw. (Ill.) 621.

be paid to the mortgagee, or held subject to the further order of the court.<sup>1</sup> When there are several lien claimants entitled to participate in the fund, in order to find the amount due each claimant, if it be provided that a jury shall pass upon them, it is the better practice to submit each claim to a distinct jury, as if it were a separate proceeding; but where there are few claimants, and there is no complication, it would not probably be objectionable to submit all the claims to the same jury.<sup>2</sup> A receiver has power to adjust by agreement the rights of claimants under the mechanics' lien law, although no steps beyond filing their claims have been taken. Where such claims have passed into judgment with the receiver's knowledge, they should be regarded as established. Where a lien claim was filed after the beginning of the insolvency proceedings in this court, it is not necessary to pursue such claim to judgment unless so required by the court or receiver.<sup>3</sup>

§ 451. **Judgment for more than is claimed.**—A judgment or decree in a suit to enforce a mechanics' lien should not be rendered for a larger sum than is claimed in the notice<sup>4</sup> or petition.<sup>5</sup> This applies, also, where interest has been allowed beyond the amount claimed. If the plaintiff be entitled to interest, he should claim it in his petition or declaration;<sup>6</sup> otherwise, it will be presumed to have been included in the claim of damages.<sup>7</sup> These rulings, it seems, would not prevent interest from being given from the time of commencement of suit, though the declaration or petition asserts no claim for it.<sup>8</sup> If judgment, however, should be entered for more than the amount claimed, the plaintiff might remit the excess.<sup>9</sup> Indeed, when it appears for any cause, although in a higher court, that the decree is for too large a sum, if the enforcement of the lien be in the nature of a chancery proceeding, or such practice is otherwise allowable, it should not be reversed, but reformed, by reducing the amount.<sup>10</sup> A decree foreclosing the lien is informal, if it does not find the amount due.<sup>11</sup>

§ 452. **Judgments in Case of Several Claimants or Defendants.**—A judgment on the lien establishing its validity in favor of a

<sup>1</sup> *Rogers v. Powell*, 1 Bradw. (Ill.) 631.

<sup>2</sup> *Power v. McCord*, 36 Ill. 214.

<sup>3</sup> *Demott v. Stockton Paper Co.*, 32 N. J. Eq. 124.

<sup>4</sup> *Protective Union v. Nixon*, 1 E. D. Smith, 671.

<sup>5</sup> *Mills v. Heeney*, 35 Ill. 174.

<sup>6</sup> *Prescott v. Maxwell*, 48 Ill. 82.

<sup>7</sup> *Udall v. Steamship Ohio*, 17 How. (U. S.) 17.

<sup>8</sup> *Mills v. Heeney*, 35 Ill. 174.

<sup>9</sup> *Protective Union v. Nixon*, 1 E. D. Smith, 671.

<sup>10</sup> *Wolfe v. Stone*, 20 Ill. 174.

<sup>11</sup> *Smith v. Shaffer*, 46 Md. 574; *Plummer v. Eckenrode*, 50 Md. 225.

sub-contractor, and a judgment in favor of contractors for an amount including the amount of the sub-contractor's judgment, are not incompatible. It is frequently the case that several judgments are recovered for the same debt, as the recovery of a judgment is not satisfaction. So, a sub-contractor, notwithstanding his judgment on the lien, may sue the contractor for the same debt, and recover it out of his property. The judgments should remain, and the proceeds arising from the sale of the property distributed properly.<sup>1</sup> But where a petition was filed against two persons, one of whom pleaded and the other made default; against the latter, judgment by default was rendered at one term, and at the next term judgment on the issue against the other; this was held erroneous, as the plaintiff could not have, in the same suit, two distinct judgments for different sums.<sup>2</sup> So, where the judgment is a general lien on all the real estate of the defendant, and also a specific lien on the building from the day upon which work was commenced, such judgment is final and conclusive and an absolute bar to the recovery of another judgment at common law, or under the general statute relating to judgments. So, a recovery of a judgment under a general statute, will be an absolute bar to the recovery of another judgment on the same claim under a mechanics' lien statute.<sup>3</sup> So, where several are jointly liable, as tenants in common in a foreclosure suit on the lien, a judgment by default cannot be entered against only one defendant; the judgment must be against all, or none of them.<sup>4</sup> Although, when a court in administering these laws acts as a court of equity, it can adapt the judgment or decree to the special circumstances of the case.<sup>5</sup> Hence, in these proceedings, where there are several defendants with diverse interests, a claimant, on showing a proper case, may have judgment against one or more of them, notwithstanding he has declared as upon a joint contract.<sup>6</sup>

§ 453. **Partnership Property.** — The judgment or decree, when partnership property becomes subject to the mechanics' lien, is governed by the ordinary rules applicable to partnerships and the distribution of their assets. Their creditors have a right to look to all the partnership property for the payment of debts; and although the legal title to the land may be in one partner, still, if he hold it in trust for the partnership, it is subject to all

<sup>1</sup> *Hill v. La Crosse & Mil. R. R. Co.*, 11 Wis. 214.

<sup>2</sup> *Falconer v. Frazier*, 15 Miss. 235.

<sup>3</sup> *Capelle v. Baker*, 3 Houst. (Del.)

344.

<sup>4</sup> *Lowe v. Turner*, 1 Idaho, 120.

<sup>5</sup> *Doughty v. Devlin*, 1 E. D. Smith, 625.

<sup>6</sup> *Redman v. Williamson*, 2 Iowa, 488.

the equities existing in favor of the creditors of the firm.<sup>1</sup> These creditors have their rights enforced through the equities of the partners themselves. Some of the cases hold that the equity of the partners cannot be set up or enforced by or on behalf of the joint creditors against the separate creditors, unless the latter are shown to have had notice of its existence at or before the time when the debts came into existence; but this would seem questionable, being contrary to the general rule that creditors are subject to all the equities of their debtors, and can take no right which the latter could not have enforced for their own benefit.<sup>2</sup> Purchasers stand upon their own equity when *bona fide*. Notice, however, subjects them to all the equities of partnership creditors. Thus, where three partners erected a mill on land, the legal title to which was vested in one of them, who conveyed it to a purchaser with notice of a mechanics' lien, and in an action instituted to foreclose the lien after the sale, the process was served on only the two partners and purchaser, but not on the member who had held the legal title, judgment was given against all the partners, to be enforced against the partnership property to which the lien attached, and the sale passed the title to the property, under a law which allowed such proceeding.<sup>3</sup>

§ 454. **Practice in Regard thereto.** — The entering of defaults, and the affirmance or reversal of judgments, and practice relating thereto, under the lien laws, are generally assimilated to the practice in other cases. For example, if a statute provide that "no judgment shall be reversed or affected by reason of any errors in the proceedings which do not affect the substantial rights of the adverse party," it is applicable as well to lien cases as others, and a judgment of lien will not be reversed for defect of form, but properly modified.<sup>4</sup> As, where a lien is given against the separate estate of a married woman, and the plea put in issue the right of the husband to make the contract under which the work was done, and the jury found a general verdict for the plaintiff, the court should enter a judgment declaring a lien and providing for its enforcement. The failure to enter such a judgment is an error which can be corrected by amendment *nunc pro tunc*, when such errors are ordinarily allowed to be corrected.<sup>5</sup> So, where a general judgment on *scire facias* was entered against both an owner and the contractor, the

<sup>1</sup> Fowler v. Bailley, 14 Wis. 125.

<sup>2</sup> 1 Lead. Cas. in Eq. 241.

<sup>3</sup> Fowler v. Bailley, 14 Wis. 125.

<sup>4</sup> Schmidt v. Gilson, 14 Wis. 514.

<sup>5</sup> *Ex parte* Schmidt, 52 Ala. 252.

judgment being void as to the former was no reason for its reversal as to the contractor.<sup>1</sup> But if there are several counts, some good and others bad, and there be a general verdict upon all the counts in favor of the plaintiff, no judgment can be properly rendered, unless it can be shown that the testimony related to the good counts only. And the like consequence follows when there is a default for want of a plea and an assessment of damages upon all the counts.<sup>2</sup> As where a declaration claimed a lien in one count, the others being the work and money counts, and the damages and judgment were upon the whole declaration generally, a judgment for a lien was bad, as the verdict might have been only on the common counts, which would not support such a judgment.<sup>3</sup> A judgment for want of an affidavit of defence ought not to be given in a *scire facias* on a mechanics' claim when the contractor is dead, and his administrator is sued.<sup>4</sup> So, where a judgment has been entered for want of a sufficient affidavit of defence the court will not open it at the instance of a surety to remove the lien by filing a bond.<sup>5</sup> Where, in a foreclosure of a lien for \$100, a decree directing that unless the judgment is paid within ten days an order of sale may issue, grants a reasonable time.<sup>6</sup> Where a judgment in such a proceeding does not conform to the decision of the court, the remedy of the party aggrieved is not by appeal, but by application to the court to correct the judgment.<sup>7</sup> If judgment is rendered for defendant because of a defective lien statement, and there is still time, a new statement may be filed, and a new suit brought.<sup>8</sup> While the courts of Common Pleas have inherent power to strike off a mechanics' lien which is defective in form or irregularly entered, yet when such lien is regularly entered, and proper in form, the courts have no power, upon the petition of the defendant, alleging an award of arbitrators in his favor, or payment thereof, and upon depositions taken thereunder, to order that said lien be marked satisfied or stricken from the record. The question of payment of such lien is one of fact, and as such is for the determination of the jury on the trial of the *scire facias*. An award of arbitrators is but evidence of such payment, and as such for the consideration of the jury.<sup>9</sup>

<sup>1</sup> Sullivan v. Johns, 5 Whart. (Penn.) 366; Weathersby v. Sinclair, 43 Miss. 189.

<sup>2</sup> Dewey v. Fifield, 2 Wis. 73.

<sup>3</sup> Du Bay v. Uline, 6 Wis. 588.

<sup>4</sup> Richards v. Reed, 1 Phila. 220.

<sup>5</sup> Swartz v. Kirkpatrick, 8 Phila. 47.

<sup>6</sup> Morgan v. Chapple, 10 Kan. 216.

<sup>7</sup> [Kenney v. Apgar, 93 N. Y. 539.]

<sup>8</sup> [Linne v. Stout, 44 Minn. 110.]

<sup>9</sup> [Stoke v. McCullough, 107 Penn. 39.]

§ 455. **Effect and Conclusiveness of.** — A judgment or decree of a court of competent jurisdiction is conclusive wherever the same matter is again brought in controversy between the same parties or privies.<sup>1</sup> The mechanics' lien law is no exception to this eminently reasonable and just rule.<sup>2</sup> Thus, an adjudication of priorities between lien claimants and encumbrancers in a proceeding to establish the lien will be conclusive and *res adjudicata*.<sup>3</sup> But this principle does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the judgment or decree.<sup>4</sup> As where proceedings were instituted against an owner to enforce a lien, and judgment by default was entered without giving the owner credit for certain payments which had been made. The owner might, notwithstanding, sue the mechanic to recover back the payments, as their payment was not adjudicated in the lien suit.<sup>5</sup> But where the very foundation of the lien has been once litigated — namely, the question of indebtedness — in a personal action by a material-man or mechanic, and judgment has been given for the owner, it is a bar to proceedings to enforce the lien arising therefrom against the same person.<sup>6</sup> Another essential element in the above rule is, there should be a judgment on the matter in controversy. In ordinary actions to recover demands from a defendant, a judgment of nonsuit, or dismissal of the complaint, would not prevent a second action for the same cause; and this rule is applied to this proceeding, unless there is something in the act which would render a different rule necessary. A statute may by its terms only contemplate one proceeding to enforce the lien, as where it is enacted "that the action, after issue, is to be tried and judgment enforced in the same manner as upon issues joined and judgments rendered in other actions in the same court, and a transcript of every judgment shall be furnished to the successful party, who may file the same with the clerk; and when the judgment is against the claimant, the clerk shall enter 'discharged' against the claim upon the docket." This provision is so comprehensive as to apply to every judgment; and a judgment of nonsuit, or dismissal of the plaintiff's complaint, comes within its meaning, and is for its purposes a final judg-

<sup>1</sup> Hopkins v. Lee, 6 Wheat. (U. S.) 109.

<sup>2</sup> McCoy v. Quick, 30 Wis. 521.

<sup>3</sup> Greenup v. Crooks, 50 Ind. 40.

<sup>4</sup> Bank of U. S. v. Beverly, 1 How. (U. S.) 134.

<sup>5</sup> Smith v. Weeks, 26 Barb. (N. Y.) 463.

<sup>6</sup> Whelan v. Hill, 2 Whart. (Penn.) 118.



ment, authorizing a discharge of the lien by the clerk.<sup>1</sup> A judgment for the sub-contractor amounts to payment of the contractor *pro tanto*, if the contractor had notice of the proceedings. He must appear and defend or he will be concluded by the judgment.<sup>2</sup> A sale in accordance with the law for enforcing liens passes to the purchaser a complete title.<sup>3</sup> In a suit to enforce a mechanics' lien against a canal the court ordered the entire canal to be sold to pay the claim; it was sold; subsequently an appeal was taken and the decree reversed for error in selling the canal as an entirety: held, that notwithstanding the reversal the title of the purchaser could not be disturbed.<sup>4</sup> When a claim for labor and materials for a building erected upon one of two adjoining lots of ground, is filed as a lien against both, it is in the power of the owner, or of any lien creditor, to have the curtilage judicially determined. But when there is a sale of both lots under the mechanics' lien, without any previous determination of the curtilage, the lien of a subsequent mortgage is discharged, and the mortgagee cannot allege that any portion of the ground embraced in the claim was unnecessary for the proper and useful purposes of the building. The purpose of the mechanics' lien docket is to give notice to purchasers and incumbrancers, and by the description therein of the property against which the claim is filed they are affected with notice of the extent of the lien claimed.<sup>5</sup> Where the vendee of land under a parol agreement of sale, being in the sole possession, erects a house on the land, and a mechanics' lien is filed against the holder of the legal title as owner, on which claim a *scire facias* is issued, duly served on both defendants, and judgment regularly entered against both, a sheriff's sale of the land under an execution upon said judgment to a *bona fide* purchaser will pass the title of the legal owner as well as of the equitable owner. If in such case, the legal owner was not in possession at the time the building was commenced, and did not authorize its erection, he should have applied to the court to strike off the lien as to him, or he should have made defence to the *scire facias*. Having permitted the judgment to be taken against him, the averment in the lien of his ownership of the building became *res adjudicata*, and the validity of said judgment cannot be attacked collaterally in a subsequent eject-

<sup>1</sup> Sullivan v. Brewster, 1 E. D. Smith, 681.

<sup>2</sup> [Midland R. Co. v. Wilcox, 122 Ind. 84, 98.]

<sup>3</sup> [Watts v. Sweeney, 127 Ind. 116, 125.]

<sup>4</sup> [2 Abbott's U. S. R. 479.]

<sup>5</sup> [Harbach v. Kurth, 131 Penn. 177.]

ment brought by him against the purchaser at the sheriff's sale.<sup>1</sup> A judgment against the claimant in a former suit on the same lien because said suit was prematurely brought is no bar to the present action.<sup>2</sup> If A. brings a lien suit against B. the owner, and the judgment is for B., a subsequent purchaser from B. cannot be subjected to A.'s lien. So long as the former judgment remains unreversed B.'s grantees are protected.<sup>3</sup>

§ 456. **Against whom.** — This conclusiveness of judgment only operates against parties and their privies;<sup>4</sup> those not made parties may impeach the record.<sup>5</sup> Thus, if the owner of the land, at the time the machinery is placed upon it, is not a party to the proceeding for the enforcement of the lien, the judgment against and sale of the lands will not affect his title.<sup>6</sup> It having been settled by repeated decisions of the supreme court of Missouri, that there can be no such thing as a mechanics' lien upon a public school building, a surety on a contractor's bond as the one above named, may, in defending a suit upon the same, deny the validity of a judgment establishing such a lien so far as he is concerned, such a judgment having been rendered in a suit to which he was not a party.<sup>7</sup> In another case, a mechanic bound himself with a surety to protect the owner against all liens of sub-contractors. Notwithstanding the agreement, sub-contractors filed liens against the house, and process for their foreclosure was served on the owner, but not on the mechanic. The owner allowed judgments by default to be entered against him, which he paid. The owner then instituted suit against the surety on the agreement of indemnity, and it was held that while the judgments by default were admissible in evidence to show their amount and payment, yet they were not conclusive of the indebtedness of the sub-contractors. The judgments by default placed the owner in no different situation than if he had satisfied himself of the justice of the claims, and then paid them. If, however, the mechanic had been a party to the suit of the sub-contractors, the judgment would have been conclusive upon both mechanic and his surety.<sup>8</sup> The court having jurisdiction of the subject-matter, the purchasers under a sale to enforce a mechanics' lien cannot be affected by the error of the court in failing to provide in its decree for the payment of a prior mortgage, the mortgagee having been made a party.<sup>9</sup> The privies above referred

<sup>1</sup> [Weaver v. Lutz, 102 Penn. 593.]

<sup>2</sup> [Seaton v. Hixon, 35 Kan. 663.]

<sup>3</sup> [Irish v. Foulks, 42 Kan. 370.]

<sup>4</sup> McCoy v. Quick, 30 Wis. 521.

<sup>5</sup> Schaeffer v. Lohman, 34 Mo. 68.

<sup>6</sup> White v. Chaffin, 32 Ark. 60.

<sup>7</sup> [State v. Tiedermann, 3 McCrary, 399.]

<sup>8</sup> Picot v. Signiago, 27 Mo. 125.

<sup>9</sup> Topping v. Brown, 63 Ill. 348.

to are parties standing in the same relation of contract or estate as would be bound in other judgments. For example, a verdict and judgment were held conclusive as to a grantor who has sold his house with special warranty, and against whom, as the owner, a claim was afterwards entered for a lien.<sup>1</sup> So an administrator of a deceased mortgagee, whose duty it was to assert the rights of the decedent, was estopped from setting up any right under a mortgage, inconsistent with the decree, when he was made a party to a proceeding to foreclose a mechanics' lien.<sup>2</sup> Upon distribution between lien-claimants of the fund derived from sale of the premises, their judgments are conclusive of the amount due and the existence of the lien.<sup>3</sup> A decree cannot be made against the property or interest of one who is not a party to the proceedings.<sup>4</sup> But one who without objection permits a judgment to be improperly obtained against him on a *scire facias sur mechanics'* claim, and permits said judgment to stand unchallenged and a sheriff's sale of his interest in land to be made under an execution of said judgment, cannot afterwards set up, in an action of ejectment, the invalidity of said judgment to the prejudice of a *bona fide* purchaser who bought at the sheriff's sale relying upon the verity of the record.<sup>5</sup> When a plaintiff brings an action to foreclose a statutory lien on funds in the hands of one against whom he has no claim outside of such a lien, against that party and one who also claimed a lien on the same fund, and the complaint in his action is dismissed on the ground that he has no lien, he is not aggrieved by a judgment against the one holding the fund in favor of his co-defendant for the amount of the fund; for if in fact he had a lien such judgment would not prevent its being finally enforced.<sup>6</sup>

§ 457. **Impeachment of, collaterally.** — A judgment, though voidable for error, cannot be impeached collaterally; it is valid and binding until reversed by writ of error or on appeal.<sup>7</sup> This principle applies with full force to judgments on mechanics' liens. They cannot be impeached even by the lien creditors of the defendant.<sup>8</sup> In a collateral proceeding, the judgment on the lien claim is conclusive as to the extent of the curtilage.<sup>9</sup>

<sup>1</sup> Hopkins v. Conrad, 2 Rawle (Penn.), 316.

<sup>2</sup> Shields v. Keys, 24 Iowa, 298.

<sup>3</sup> Hall v. Spaulding, 40 N. J. L. 166.

<sup>4</sup> [Snodgrass v. Holland, 6 Colo. 596, 598; citing Lowe v. Turner, 1 Idaho, 110.]

<sup>5</sup> [Weaver v. Lutz, 102 Penn. 593.]

<sup>6</sup> [Bassler v. Putney, 53 N. Y. Super. 456.]

<sup>7</sup> Huff v. Hutchinson, 14 How. (U. S.) 586; [Shryock v. Buckman, 121 Penn. St. 248; citing Hartman v. Ogborn, Butterfield's App.]

<sup>8</sup> Lauman's Appeal, 8 Penn. 473.

<sup>9</sup> Gerard v. Birch, 28 N. J. Eq. 317.

§ 457 *a*. **Presumptions in Favor of.** — A judgment in a mechanic's lien suit raises the presumption, which cannot be collaterally refuted, that the suit was commenced within the statutory period, and that the lien was filed in time, and such judgment can be attacked in a collateral proceeding only by showing a want of jurisdiction in the court where the judgment was rendered.<sup>1</sup> So, a decree in a mechanics' lien case is presumed to be correct, and the party complaining must preserve the evidence to show its error.<sup>2</sup>

§ 457 *b*. **Immaterial Errors.** — In an action to enforce a lien for materials a judgment giving a lien on defendant's interest in more than one acre of land in an incorporated village is erroneous; but where the defendant had testified that he had no interest in a portion of such land, which, being deducted, would leave less than an acre affected by the lien, the error is immaterial.<sup>3</sup> So in an action to enforce a lien for labor done in erecting a barn, the judgment directed the sale of the barn, and of the interest of the defendant in the land upon which it stood. Held that if technically wrong in not directing the sale of only defendant's interest in the barn as well as the land, the error could not prejudice the defendant, and would not work a reversal.<sup>4</sup> So where the laborer does not ask a foreclosure against the realty in his summary process, a mistaken insertion by the clerk of the words "lands and tenements" in the execution will not vitiate the lien.<sup>5</sup>

<sup>1</sup> *Allen v. Sales*, 56 Mo. 28.

<sup>4</sup> [*Edleman v. Kidd*, 65 Tex. 18.]

<sup>2</sup> *Lewis v. Rose*, 82 Ill. 574; *Jennings v. Hinkle*, 81 Ill. 183.

<sup>5</sup> [*Dixon v. Williams*, 82 Ga. 105, 109.]

<sup>3</sup> [*Crocker v. Currier*, 65 Wis. 662.]

## CHAPTER XLII.

## EXECUTIONS AND SALES.

§ 458. **Special Execution.** — The execution to be issued for the enforcement of the lien is generally provided for by express enactment. An implied authority to adapt the execution to the foreclosure of the lien has been presumed from a statute, that “execution may issue and be levied upon the premises subject to such lien, and sale thereof be made in the manner prescribed by law.”<sup>1</sup> The common-law writ of *feri facias* has been extensively adopted. Some States have substituted the writ of *levari facias*, as more expeditious and less expensive.<sup>2</sup> Unless otherwise provided, the execution is always special against the particular property encumbered with the lien. Although, where a law existed that “the court shall give judgment according to the justice of the case, and that the clerk of the court, when judgment has been had under its provisions, on application, shall issue a special execution against the particular property,” it was held that, as the law was passed for the benefit of mechanics, they might abandon it at their pleasure, either before or after judgment, and issue a general execution. If they elected not to issue the special execution under the statute, it would amount to an abandonment of the special lien, and they would then occupy the same position with other judgment creditors.<sup>3</sup> If the court, however, has jurisdiction not only to enforce the lien, but is required to enter a general judgment against the owner for the amount of the indebtedness, a general execution would not operate as a waiver of the lien, and might be levied upon other, as well as the particular, property. Where the law only authorizes an execution to issue in favor of sub-contractors for any balance that remains, after selling the property on which the lien exists, and ordered to be sold, it is error to award an execution in the first instance against the owner and contractor, as the right is purely of statutory origin, and must be controlled

<sup>1</sup> Bailey v. Hull, 11 Wis. 289.

<sup>2</sup> Penn. Statutes, act of 1836; Pentland v. Kelly, 6 Watts & S. (Penn.) 483.

<sup>3</sup> Richardson v. Warwick, 7 How. (Miss.) 131; Kirk v. Taliaferro, 16 Miss. 754.

by enactment.<sup>1</sup> The sale of property covered by a mechanic's lien executed by the owners and lessors of property, and foreclosed, should not be enjoined at the instance of a creditor of the lessee of the property who holds a younger mechanics' lien on the interest of the lessee for the completion of work which the lessee had bargained with the lessors to have completed, especially where the holder of the junior lien had notice of the older lien. If there were doubts as to the priority of the liens, the property should be sold and the contest be made over the proceeds of sale; and the mere allegation that from the condition of the times the property would not bring its full value is no equitable ground for injunction. If both liens were on the whole property under contract with the owners, the older would be the better lien, and, unless attacked as invalid for some legal or equitable reason, the sale under the older lien should not be enjoined at the instance of the junior creditor.<sup>2</sup> In Missouri on the judgment enforcing the lien, the plaintiff should file the transcript with the circuit clerk, and process should go from the clerk's office, and not from the justice's court, for the enforcement of the judgment. But before the sheriff can proceed to execute the judgment against the special property (that is, the owner's), he must exhaust the remedy against the property of the real debtor (the contractor), and if no property of the debtor can be found, this should be made to appear by the officer's return. Where the return and the proof show that he only levied on the special property, and the return fails to show that he made any effort to find property of the contractor under such a return, he was not authorized to sell the property of the owner. The act of the sheriff in such case is premature, and the remedy is by motion to quash the levy and vacate the return.<sup>3</sup> A purchaser under a *levari facias* on a judgment obtained on a mechanics' lien may obtain possession by summary process in like manner as if he had purchased at a sale made on a *venditioni exponas*.<sup>4</sup> A court, out of which a special *feri facias* on a mechanics' lien judgment has issued, will not order it to be set aside, on the motion of a party who has purchased the property covered by the mechanics' lien, at a sale under another special *feri facias* on a judgment entered on a mechanics' lien filed by a different party upon the same premises.<sup>5</sup>

<sup>1</sup> Baptist Church v. Andrews, 87 Ill. 172; Gould v. Garrison, 48 Ill. 258.

<sup>2</sup> Winn v. Henderson, 63 Ga. 365.

<sup>3</sup> [Fink v. Alderson, 20 Mo. App. 364.]

<sup>4</sup> [Walbridge's Appeal, 95 Penn. St. 466.]

<sup>5</sup> [Murphy v. Borden, 49 N. J. L. 527.]

§ 459. **Property of Municipal Corporations exempt.** — The right to issue execution under mechanics' lien laws has, in the absence of express provisions, been denied when the building has been erected for municipal corporations, and is devoted to public purposes. The reasoning of the court is, that these municipal or public corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power as may be adjudged necessary by the legislature granting the charter, for the proper government of the people within the limits of the city or town incorporated, and for the due and efficient administration of their local affairs. For these purposes the authorities can raise revenue by taxation, exercise certain judicial powers, and generally act within their limited spheres, as any other political body, restrained only by the charter creating them. This power of taxation is plenary, and furnishes ordinarily the only means such corporations possess by which to pay their debts. They cannot be said to possess property liable to execution in the sense an individual owns property so subject, for they have the control of corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property, and removing it, would work the most serious injury in any city. Many cities have costly water-works, indispensable to the lives and health of the citizens. These works are as much the property of the city as any other it may control, and, if such was the law, liable to be seized and sold on execution, to the great discomfort and probable ruin of the inhabitants. Fire-engines are also indispensable; they, too, could be seized and sold, and a great city exposed to the ravages of fire, — and all this to enable one or more creditors of the city to obtain the fruits of judgments against the city, which, by another process, not producing any of these destructive inconveniences, they could fully obtain. The money raised by taxation could also be levied upon, and the whole business of the city broken up and deranged. Its officers and office furniture, its jails, hospitals, and other public buildings, taken from the corporate authorities and sold to strangers, who would have a right to the exclusive possession of them. Therefore, in the absence of a express statute authorizing a proceeding fraught with such consequences, its property is not subject to the ordinary *feri facias*.<sup>1</sup> And, in order to warrant the conclusion that

<sup>1</sup> Chicago v. Hasley, 25 Ill. 595.

such property is made liable to the mechanics' lien, something more must appear in the law than the ordinary provision that a claim for building is to be "a lien against the particular property, enforceable as judgments rendered in other civil actions,"<sup>1</sup> or that the corporation can sue and be sued.<sup>2</sup> These positions are the more strongly fortified, and there can be no doubt of the exemption of such buildings from the mechanics' lien laws, when no execution can go against any property of such corporations in consequence of special statute, which provides for the payment of their debts by order of court and attachment of public commissioners of the county.<sup>3</sup>

§ 460. **Mandamus.** — If no property can be found other than that devoted to public use, and the corporation has power to levy a tax to pay its debts, the remedy in the absence of special provision by statute, is by *mandamus* to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax. For where a power of taxation is given to a municipal corporation to pay its debts, it is in the nature of a trust for the benefit of creditors, and a *mandamus* will issue when there is no other means for paying the debt.<sup>4</sup> A bill in equity will not lie for this purpose.<sup>5</sup> Sequestration of the earnings of a corporation, after the payment of current expenses, is sometimes resorted to, in cases of *quasi*-public corporations, such as railroad, canal, and bridge corporations, allowing them to progress with their undertakings to accommodate the public. A receiver or other officer may then be appointed to take charge of their funds until the payment of the indebtedness.<sup>6</sup> A State which has once authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements cannot withdraw the power thus given until the contract is satisfied, and a law repealing the power of taxation is a nullity. *Mandamus*, notwithstanding, should issue to compel the exercise of this power, and the appropriation of the money thus raised to the liquidation of its debts.<sup>7</sup>

§ 461. **Private Corporations.** — The considerations which lead to the exemption of property of municipal corporations from

<sup>1</sup> Brinkerhoff v. Board of Education, 37 How. Pr. (N. Y.) 520.

<sup>2</sup> Board of Education v. Greenebaum, 39 Ill. 610.

<sup>3</sup> Wilson v. Commissioners, 7 Watts & S. 197; Foster v. Fowler, 60 Penn. 27.

<sup>4</sup> Brinkerhoff v. Board of Education, 37 How. Pr. (N. Y.) 520; 24 How. (U.S.)

376; City of Galena v. Amy, 5 Wall. (U. S.) 705; Board of Education v. Greenebaum, 39 Ill. 610.

<sup>5</sup> Walkley v. City of Muscatine, 6 Wall. (U. S.) 481.

<sup>6</sup> Foster v. Fowler, 60 Penn. 27.

<sup>7</sup> Van Hoffman v. City of Quincy, 4 Wall. (U. S.) 535.



execution do not apply to private corporations. Creditors against the latter have only a remedy against them by judgment and execution, as in case of individuals.<sup>1</sup> For the same reasons the property of public municipal corporations not devoted to public use may be taken on execution, and sold to satisfy the judgment.<sup>2</sup>

§ 462. **Location of Property.** — In many of the States an amount of land, as an acre or more, particularly when outside the city or town limits, is subjected with the building to the lien of the mechanic. In these cases it is necessary, before issuing execution, to locate accurately by metes and bounds the property to be levied upon and sold. This cannot be done in the notice or claim of lien. It would be neither safe nor expedient, as has been shown,<sup>3</sup> to allow either the claimant or owner to locate the acre or other quantity. Some statutes have authorized the appointment of commissioners for this purpose. When this authority is not expressly given, it will be presumed, nevertheless, to reside in the court for the purpose of enforcing the remedy provided. Where an issue has been directed to ascertain the amount of land subject to the lien, it is the province of the jury to ascertain and determine by their verdict what part of the ground is "necessary for the convenient use of the building," for the purposes for which it was intended.<sup>4</sup> The execution of a prior judgment creditor will be stayed, on the petition of a subsequent mechanics' lien creditor, until the curtilage appurtenant to the building has been set off.<sup>5</sup> Where there were several houses built on several lots, and various claims on each, one lot with house should not be sold for what was due on another where the lien is given by statute on each lot respectively.<sup>6</sup> An execution against more property than the lien covers, is still good as to property that is covered.<sup>7</sup>

§ 463. **Duty of Officer making Sales.** — The officer making sales under an execution or decree should conform strictly to it as to time, terms of sale, mode of advertising, and interest of the party to be sold.<sup>8</sup> As where the law directs the sale, not of the land and premises upon which the lien exists, but of the owner's interest therein, to the extent of his right at the time

<sup>1</sup> Board of Education v. Greenebaum, 39 Ill. 610; Foster v. Fowler, 60 Penn. 27.

<sup>2</sup> Brinckerhoff v. Board of Education, 37 How. Pr. (N. Y.) 520.

<sup>3</sup> Chapter XVII.

<sup>4</sup> Keppel v. Jackson, 3 Watts & S. 320.

<sup>5</sup> Flickinger v. Huber, 31 Penn. 344.

<sup>6</sup> Bayard v. McGraw, 1 Bradw. (Ill.) 134.

<sup>7</sup> [Bennett & Co. v. Gray, 82 Ga. 592, 595; Dixon v. Williams, 82 Ga. 105.]

<sup>8</sup> Gould v. Garrison, 48 Ill. 258.

the notice of lien was filed, and the sheriff, although the direction in the judgment was correct, sold the property itself, a resale was ordered by the court, to the end that only the owner's interest might be sold. It is not, under the above law, necessary to sell in express terms subject to mortgages or other encumbrances, because, if the sale be properly made of only the defendant's interest, such sale will, as matter of law, be subject to the rights and interests of any other person in the premises.<sup>1</sup> Where, however, the interest of the party to be sold is not limited by statute, and the enforcement of the lien is a chancery proceeding, the court may, if it see proper, direct the sale of the estate of all parties having an interest in the premises who are parties to the suit. But it is under no obligation to do so; and the better practice is not to do so, if the objects of the statute can be attained by decreeing a sale of the interest of those parties only against whose interest the lien equitably attaches.<sup>2</sup> Notwithstanding the foregoing rule, there must be some substantial nonconformity to avoid the sale. For example, although "chancery rules are to be adopted as far as applicable," still a sale made by a sheriff under a special execution is not irregular, the same result following as if a master or commissioner had been ordered to make it. The return of the sheriff would be simply a report of the sale, which, if not made in pursuance of law, might be set aside by the court, and another sale ordered.<sup>3</sup> So where, after judgment upon the lien, which directed, in general terms, the sale of the property to satisfy it, the plaintiff, at the request of the attorney of defendant, released from the lien a portion of the ground not covered by the building or necessary to its use, and caused the remainder to be sold by the sheriff, the sale was not irregular for want of conformity to the judgment.<sup>4</sup> A sale will be presumed to be for cash, unless the giving of a credit is proven.<sup>5</sup> And where the law is silent as to the manner officers shall execute, the sales should be made in a situation convenient to the records; otherwise, purchasers might be misled or the property sacrificed by reason of the uncertainty of their existence.<sup>6</sup> So a sheriff, as an officer of the court, is bound to obey its judgments and decrees; and it is not within his province to say that any direction contained therein is erroneous, or to refuse obedience. As where the sheriff refused

<sup>1</sup> *Smith v. Corey*, 3 E. D. Smith, 642.

<sup>2</sup> *Kidder v. Aholtz*, 36 Ill. 478.

<sup>3</sup> *Kelly v. Chapman*, 13 Ill. 530.

<sup>4</sup> *Carney v. La Crosse & Mil. R. R. Co.*, 15 Wis. 503.

<sup>5</sup> *Pollock v. Ehle*, 2 E. D. Smith, 541.

<sup>6</sup> *Ashburn v. Ayres*, 28 Mo. 77.

to deliver a deed to a purchaser at a sale directed by a judgment under the mechanics' lien law, although the delivery of the deed was required in the judgment. If the judgment was erroneous, it could only be corrected on appeal, and until then it was his duty to obey its provisions.<sup>1</sup> A certificate of sale by the sheriff would not be a compliance.<sup>2</sup> A sale by a sheriff on execution to the claimant himself is good and his deed will pass title.<sup>3</sup> Where the liens attach at different times, and the owner's interest may have varied and incumbrances may have intervened, there must be as many separate sales as liens established.<sup>4</sup>

§ 464. **Redemption.** — Statutes of redemption, when applicable alone to personal actions, have been generally held not to include mechanics' liens, if the latter be in the nature of proceedings *in rem*; as the sale of property against which a specific lien is adjudged is more analogous to a sale on foreclosures than to an ordinary sale on an execution issued against the property generally.<sup>5</sup> The mere fact that the lien law directs an execution to issue to enforce the judgment does not bring them within the purview of such laws.<sup>6</sup> So, under a statute which provides that redemptions shall only apply to sales "on execution or other final process," when land is sold under a proceeding to enforce a mechanics' lien, in which neither an execution or other final process is issued, there is no redemption.<sup>7</sup> But where general provision is made for redemption of all property sold on execution, and the lien is enforced by execution, it includes sales made in the enforcement of mechanics' liens.<sup>8</sup> If, however, it be the policy of a State to allow redemption of sales on execution, and the mechanics' lien is enforceable in equity, and parties have not the right to redeem, the decree should give a reasonable time within which the money is to be paid, and in default of payment within the time, a sale of the premises. When the amount is large, the time should be longer than when it is small, and should be limited ordinarily to the time in which a sheriff has to make the money on execution.<sup>9</sup> It has been held to be error to decree the sale of real estate under the lien at an earlier period than ninety days from the date of the decree; and when the amount is large, and the estate valuable

<sup>1</sup> *Smith v. Corey*, 3 E. D. Smith, 642.

<sup>2</sup> *Randolph v. Leary*, Id. 637.

<sup>3</sup> *Viti v. Dixon*, 12 Mo. 479.

<sup>4</sup> *Morgan v. Stevens*, 6 Abb. N. Cas.

365.  
<sup>5</sup> *Bailey v. Hull*, 11 Wis. 289.

<sup>6</sup> *Randolph v. Leary*, 4 Abb. Pr. (N.Y.) 205.

<sup>7</sup> *Armsby v. People*, 20 Ill. 155.

<sup>8</sup> *State of Iowa v. Eads*, 15 Iowa, 114.

<sup>9</sup> *Link v. Arch. Iron Works*, 24 Ill. 551.

beyond the encumbrance, six months should be given for payment before a sale is ordered.<sup>1</sup> Thirty days would be too limited.<sup>2</sup> So is a shorter period than the lifetime of an execution.<sup>3</sup> A court of law, also, having control of its executions, will sometimes, when the justice of the case requires, stay execution. Thus a contract on which a mechanics' lien was filed stipulated that "the balance was to be paid after all the men that worked on the building should have been paid." On the trial the owner offered in evidence a party who had worked on the building, and who testified that there was still due him a small amount, for which he had instituted suit, but no plea had been filed putting in issue this fact; a verdict was given for the full amount, but execution was refused for the amount alleged to be due to the witness until the suit brought by him was determined.<sup>4</sup>

<sup>1</sup> Robinson v. Magarity, 28 Ill. 426.

<sup>2</sup> Moore v. Bracken, 27 Ill. 23.

<sup>3</sup> James v. Hambleton, 42 Ill. 308.

<sup>4</sup> Shapland v. Nash, 2 Am. L. J. 570.

## CHAPTER XLIII.

## VARIANCES.

§ 464 *a*. **Variance between the Notice and the Complaint.** — The notice and complaint must agree in all essential statements. It is a fatal variance if the complaint is on a *quantum meruit* and the notice states the contract to be for a fixed price.<sup>1</sup> Where the complaint affirms that a claim was duly recorded and cites its contents in the words of the statute, but the claim recorded was in fact improperly drawn, a denial in the answer, upon *information and belief*, that the claim contains the necessary facts is sufficient to raise an issue.<sup>2</sup> So a description of the premises, in a petition to foreclose a mechanics' lien, is bad if it contradicts the description of the registered affidavit.<sup>3</sup>

§ 464 *b*. **Variance between Complaint and Proof.** — A substantial variance between the proof and the bill will cause the petition to be dismissed.<sup>4</sup> Where the complaint alleges a lien for work on a certain building, the proof shows that the contract related to work on two buildings, and the notice leaves it doubtful whether there were one or two buildings involved, there is a fatal variance, and a finding sustaining the lien is not supportable.<sup>5</sup> A plea that land was the wife's homestead will not admit proof that it is the husband's.<sup>6</sup> A claim and complaint for the whole value when the proof shows that part has been paid is not a fatal variance.<sup>7</sup> A variance between the statement and the proof as to the time certain items of material were furnished, no prejudice appearing, is not fatal.<sup>8</sup> Where the petition to establish a mechanics' lien declares on a *quantum meruit*, and the proof shows a written contract, this is not fatal to the lien, where the price charged is not in excess of the contract price, and where the work and materials are shown to have been put

<sup>1</sup> [Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 580 ; citing Frazer v. Barlow, 63 Cal. 71.]

<sup>2</sup> [Hagman v. Williams, 88 Cal. 146, 150.]

<sup>3</sup> [Lyon & Gribble v. Logan & Mundy, 66 Tex. 57.]

<sup>4</sup> [15 Bradw. 436.]

<sup>5</sup> [Eaton v. Malatesta, 92 Cal. 75.]

<sup>6</sup> [Bergsma v. Dewey, 46 Minn. 357.]

<sup>7</sup> [Nichols v. Culver, 51 Conn. 177.]

<sup>8</sup> [Linne v. Stout, 41 Minn. 483.]

into the building and to have been worth the price charged.<sup>1</sup> Where the complaint alleges that the defendant is owner of the land, and the proof is that he owns the building and is tenant for years of the land, there is no fatal variance.<sup>2</sup> The fact that the petition for the lien states that the materials were sold to both the husband and the wife, while the complaint and the proofs show that they were sold to the husband alone, is immaterial. The petition might be amended at any time to correspond with the complaints and proofs.<sup>3</sup> So it is an immaterial variance that the petition states that the materials were used in the erection of a certain building, on the land in question, while the complaint alleges that they were used in the erection of a house and barn thereon.<sup>4</sup>

§ 464 c. **Other Variances.** — The courts will not allow unsubstantial variances to defeat the lien.<sup>5</sup> A variance between the claim and the notice to the owner that is not misleading will be disregarded.<sup>6</sup> Where in a lien account and the statement before the justices two parties are named as original contractors, but in the judgment only one is charged, held this could not avail on appeal, much less on motion, to quash execution.<sup>7</sup>

<sup>1</sup> [Jodd v. Duncan, 9 Mo. App. 417.]

<sup>2</sup> [McCarty v. Burnet, 84 Ind. 24.]

<sup>3</sup> [North v. La Flesh, 73 Wis. 520.]

<sup>4</sup> [Id.]

<sup>5</sup> [Reed v. Norton, 90 Cal. 590, where a number of variances existed and were

disposed of. See also Green v. Clifford, 94 Cal. 49.]

<sup>6</sup> [Henry v. Plitt, 84 Mo. 237.]

<sup>7</sup> [Building & Planing Mill Co. v. Huber, Wilson & Tullis, 42 Mo. App. 432.]

## CHAPTER XLIV.

## APPEALS.

§ 465. **General Principles applicable thereto.**—There is nothing in the mechanics' lien laws that distinguishes appeals therein from those taken in other civil actions. The principles relating to the latter have been usually applied to these proceedings. The rule that none but parties to a judgment or decree have the right to appeal has been enforced where a judgment was obtained under a lien law, without notice, as provided by the statute; thus a mortgagee of property, who had no notice, actual or constructive, has no right to appeal therefrom.<sup>1</sup> But where a statute provides for a formal suit, a publication of notice, an appearance upon the part of all lien claimants other than those commencing the suit, and a disposition of the entire matter of liens against the property affected, in one proceeding, any person prejudiced by any error in the proceedings may object thereto.<sup>2</sup> So, an owner, who has been made party to a mechanics' lien case, is entitled to appeal from a judgment in favor of a sub-contractor subjecting his premises to the lien.<sup>3</sup> The contractor can appeal from a lien decreed against the property.<sup>4</sup> In a proceeding for this lien, it is the duty of the party who complains of the verdict to preserve the evidence in the record, either by bill of exception, certificate of the judge, or other approved manner.<sup>5</sup> Where the record is from an inferior tribunal of limited jurisdiction, as a marine or justice's court, it has been held that the return should present all the testimony adduced in the court below so that the appellate court may see whether the judgment, and the reasons assigned therefor by the justice, are supported by the evidence.<sup>6</sup> Another general principle equally applicable to this proceeding is that no error will

<sup>1</sup> *McKim v. Mason*, 3 Md. Ch. Dec. 187.

<sup>2</sup> *Elliott v. Ivers*, 7 Nev. 287.

<sup>3</sup> *Hilliker v. Francisco*, 65 Mo. 598.

<sup>4</sup> [*Swift v. Martin*, 20 Bradw. 515, 520.]

<sup>5</sup> *Kelly v. Chapman*, 13 Ill. 530.

<sup>6</sup> *McBride v. Crawford*, 1 E. D. Smith, 658.

be presumed in a doubtful record;<sup>1</sup> and a court on appeal upon contradictory evidence will not interfere with the finding,<sup>2</sup> or a referee's report.<sup>3</sup> If the claim is for work on a building and "counters, shelving, etc.," without anything to show they were fixtures, but the court finds that the lien was upon the building and "certain articles affixed to it," it will be presumed on appeal that the evidence supported the finding.<sup>4</sup> If the court below finds that work was done at a specific date it will be presumed that it was done under contract or with the owner's assent.<sup>5</sup> If the evidence is conflicting and the truth doubtful, the appellate court will not interfere with a decree if the evidence contains facts sufficient to support the decree.<sup>6</sup> For the court to reverse on the findings of facts, the decision must be clearly against the weight of evidence.<sup>7</sup> So objections which might have been made below cannot usually be assigned for the first time on appeal.<sup>8</sup> A party must make the objections on which he relies in the lower court. Such as are not made there will not be allowed in the Supreme Court.<sup>9</sup> The defence that the land described was not shown to be less than one acre, will not be permitted to be raised for the first time on appeal.<sup>10</sup> Where it appears on the trial that part of the work was done by a substitute, but the fact is not urged as a defence, it cannot be taken advantage of upon appeal.<sup>11</sup> One who asks to come in and defend the lien suit as the vendee of the original defendant, cannot on appeal deny his own or his vendor's title.<sup>12</sup> A defendant in an action of assumpsit who appears and submits the case for trial cannot on appeal raise for the first time the point that the plaintiff's remedy was in equity.<sup>13</sup> An objection to the complaint because of describing the defendants as partners instead of late partners comes too late when first made on appeal.<sup>14</sup> In an action to foreclose mechanics' liens a defendant who was made such merely as being a subsequent lien claimant, and who did not put in any answer showing his interest or make any appearance in the action until after judgment, when he moved to set aside the judgment because the clerk had no jurisdiction to

<sup>1</sup> *Haight v. Schnuck*, 6 Kan. 192.

<sup>2</sup> *Lutz v. Ey*, 3 Abb. Pr. (N. Y.) 475. 139.

<sup>3</sup> *Lutz v. Ey*, 3 E. D. Smith, 621.

<sup>4</sup> *Sidlinger v. Kerkow*, 82 Cal. 42.]

<sup>5</sup> *[Springs Co. v. Lumber Co.]*, 47 Kan. 672.]

<sup>6</sup> *[Jacoby v. Scougale]*, 26 Ill. App. 46 ; *vest.*  
*Koeritz v. Neimes*, 26 Ill. App. 562.]

<sup>7</sup> *Gridley v. Rowland*, 1 E. D. Smith, 670.

<sup>8</sup> *Busfield v. Wheeler*, 14 Allen (Mass.),

<sup>9</sup> *[Pool v. Wedemeyer]*, 56 Tex. 287.]

<sup>10</sup> *[Egan v. Menard]*, 32 Minn. 273.]

<sup>11</sup> *[Id.]*

<sup>12</sup> *[South Omaha L. Co. v. Central In-*  
*vest. Co.]*, 32 Neb. 529.]

<sup>13</sup> *[Conklin v. Plant]*, 34 Ill. App. 264.]

<sup>14</sup> *[Emerson & Co. v. Gainey]*, 26 Fla.



enter it, cannot be heard to question the judgments and findings on appeal.<sup>1</sup> Again, where a contractor, in the pleadings and at the trial, confined himself to the defence that the sub-contractor had not performed his agreement, he was confined to that objection on appeal, and the existence of a contract between the contractor and the owner was presumed.<sup>2</sup> In a proceeding to foreclose a lien, a finding that a certain sum is due to the contractor is a finding of fact; and if it were deemed a conclusion of law, the objection that the facts were not found and stated separately is not available on an appeal.<sup>3</sup> And in a *scire facias* against two, with an award of arbitrators against both, where one entered an appeal and pleaded alone; on the trial, the jury were sworn as to both, and the one who had not appealed moved the court to dismiss the jury in consequence of the mistake, which was refused, — a verdict was given against both defendants, and the one who had appealed prosecuted a writ of error, and it was held that he could not assign, as error, the mistake in swearing the jury.<sup>4</sup> Where the powers and duties of the appellate court in relation to liens "shall be the same as are now provided by law in relation to appeals in ordinary chancery cases," it thereby excludes any other mode of review, and the finding of a jury is therefore not considered decisive and controlling as at common law, but analogous to a verdict on a feigned issue in a chancery cause.<sup>5</sup> Setting aside defaults is in the sound discretion of the court.<sup>6</sup> Other defendants appealing cannot complain of the form of the judgment against the contractor who does not appeal.<sup>7</sup> An error which does not affect the appellant, he cannot complain of.<sup>8</sup> One defendant cannot assign as error matters which do not affect him, but only a co-defendant who does not complain.<sup>9</sup> It is no objection to a verdict declaring a lien, that improper items which are omitted from it are included in the personal findings against defendants who are not affected by the lien and who have not appealed.<sup>10</sup> The "amount in controversy" referred to in § 191, subsection 3, of the New York Code limiting appeals, is the amount due

<sup>1</sup> [Shanbanaw v. C. C. Thompson & Walkup Co., 80 Wis. 621.]

<sup>2</sup> Dennistoun v. McAllister, 4 E. D. Smith, 729.

<sup>3</sup> Smith v. Coe, 29 N. Y. 666.

<sup>4</sup> Hills v. Elliott, 16 Serg. & R. 56.

<sup>5</sup> Willard v. Magoon, 30 Mich. 273.

<sup>6</sup> Haight v. Schuck, 6 Kan. 192.

<sup>7</sup> [Western Lumber Co. v. Phillips, 94 Cal. 54.]

<sup>8</sup> [Portoues v. Holmes, 33 Ill. App. 312; Randolph v. Chisholm, 29 Ill. App. 172.]

<sup>9</sup> [Kankakee Coal Co. v. Crane Bros. Man. Co., 28 Ill. App. 371.]

<sup>10</sup> [McLaughlin v. Schawacker, 31 Mo. App. 365.]

the contractor, and not the amount claimed by the lienor.<sup>1</sup> A suit to foreclose a mechanics' lien is not an action "affecting the title to real estate or an interest therein" within the exception of the law limiting appeals.<sup>2</sup>

§ 466. **Effect of.** — The effect of an appeal upon the lien is generally regulated by statute, and not in all cases identical. In Iowa, an appeal with *supersedeas* bond only suspends execution; it does not impair or destroy the binding efficacy of this lien.<sup>3</sup> So, in California, the perfecting an appeal by filing a bond does not release the lien of a judgment: it merely stays execution.<sup>4</sup> When an appeal by express statute does not stay proceedings, except upon special order of the judge of the court below, the lien will be discharged when such is the judgment, notwithstanding an appeal, unless proceedings have been so stayed.<sup>5</sup> No appeal will lie unless provided for by law. And where an appeal is given in certain cases, and no other, it impliedly negatives the idea of any appeal for other matters. Thus, if "any person aggrieved at any decree of the court ascertaining and marshalling claims of mechanics may appeal," a decree simply establishing a lien and appointing a master to marshal liens is not the subject of appeal; but only a decree establishing the master's report, which ascertains and marshals the liens, may be appealed from.<sup>6</sup> Issuing an execution by an appellant upon a judgment rendered in his favor, and the collection of the amount thereof after the bringing of an appeal thereon by him, are inconsistent, and constitute a waiver of his right to prosecute further the appeal.<sup>7</sup>

<sup>1</sup> [Powers v. Yonkers, 114 N. Y. 145, 153. The amount due must be \$500 or more. Hall T. C. Co. v. Doyle, 133 N. Y. 603.]

<sup>2</sup> [Norris v. Nesbit, 123 N. Y. 650; Hall T. C. Co. v. Doyle, 133 N. Y. 603.]

<sup>3</sup> Julien Gas Light Company v. Hurley, 11 Iowa, 520.

<sup>4</sup> Low v. Adams, 6 Cal. 277. See also Dewey v. Latson, 6 Cal. 130.

<sup>5</sup> Van Cleve v. Abbatt, 3 Abb. Pr. N. S. 144.

<sup>6</sup> Sweet v. James, 2 R. I. 270.

<sup>7</sup> Knapp v. Brown, 11 Abb. Pr. N. S. 118.

## CHAPTER XLV.

## COSTS.

§ 467. **When allowed.** — Costs, when not regulated by statute, are discretionary with the court;<sup>1</sup> they constitute an integral part of the claim and are, with the debt, a specific lien on the property,<sup>2</sup> or, when sold, against its proceeds.<sup>3</sup> If the mechanic establish his claim for any sum within the jurisdiction of the court, he will ordinarily be entitled to his costs.<sup>4</sup> The owner may by tender, or where a statute authorizes the payment of money into court, protect himself thus from liability.<sup>5</sup> So, where an owner has the right to come in and offer that the plaintiff might take judgment for a certain sum, and a final judgment is rendered for less than that sum, the owner has the right to costs accruing after the offer, and this though a judgment was rendered for the full amount claimed, but was reduced by a superior court on appeal.<sup>6</sup> But notwithstanding such a statute, if there be moneys sufficient in the owner's hands due to the contractor, costs will be awarded against the owner, payable out of the funds.<sup>7</sup> Under a statute which directed that the proceeds of sale "shall be applied to the payment of the costs of the action, and of the amount found to be due to the claimant," all costs before judgment must be paid out of the proceeds of sale, and cannot properly be directed to be paid by the owner of the land.<sup>8</sup> And where a sub-contractor has filed a notice to create a lien on funds in the hands of the owner, and the latter retained in his hands the amount claimed, and, when the foreclosure was commenced, interposed no obstacle to its collection, but suffered a default as against himself; and where the original contractor at his own request had been made a party to the pro-

<sup>1</sup> *Kaye v. Bank of Louisville*, 9 Dana (Ky.), 261.

<sup>2</sup> *Eagleson v. Clark*, 2 E. D. Smith, 644; *Morgan v. Stevens*, 6 Abb. N. Cas. 356.

<sup>3</sup> *McLaughlin v. Smith*, 2 Whart. (Penn.) 122.

<sup>4</sup> *Myer v. Gleisner*, 7 Wis. 55; *Albers v. Eilers*, 18 Mo. 279.

<sup>5</sup> *Williamson v. Hendricks*, 10 Abb. Pr. (N. Y.) 98.

<sup>6</sup> *Lumbard v. Syracuse*, 62 N. Y. 290.

<sup>7</sup> *Dunning v. Clark*, 2 E. D. Smith, 535.

<sup>8</sup> *Fox v. Kidd*, 77 N. Y. 489.

ceeding to defend, the owner, being a mere stakeholder, should not be charged with the cost of litigation between the claimant and contractor, to determine, in effect, the right as between them to the money. In a case of interpleader, the owner would have been obliged to pay the money into court in discharge of the lien to relieve himself of costs; but such omission to pay costs, in case he makes no defence, will not charge him with those created by such litigation between the contractor and claimant.<sup>1</sup> If the plaintiff should fail in establishing his lien, or if he must perfect his judgment within a certain period, which he fails to do, costs will be awarded against him. But a court might possibly in such case, upon good cause shown, allow the plaintiff to discontinue without costs; as when a discharge in bankruptcy has taken place since the commencement of suit.<sup>2</sup> So, where a statute provides "that the owner may apply by petition to compel the claimant to proceed on his claim," it makes the owner an actor, and has the effect of prohibiting the claimant from suffering a nonsuit, or going out of court without the payment of costs.<sup>3</sup> But where separate defences were interposed by the same attorney for the contractor and owners, and the cause was dismissed, and there was no necessity for their putting in separate defences, and none were made on the trial, separate bills of costs were not allowed against the claimant.<sup>4</sup> Yet, where there are several liens, each should be fully proved, and the claimants whose liens are established should have costs of the action against the owners who contest them; and costs as on failure to answer against the contractor.<sup>5</sup> When judgment is rendered against one, cited by publication, in a suit by a building-material-man to enforce his lien, the fee allowed the attorney appointed to defend the absent defendant may be taxed in bill of costs and satisfied out of the proceeds of the sale of the property on which the lien is enforced.<sup>6</sup> In such a proceeding the owner may be adjudged to pay the costs of the proceeding in addition to the sum found to be due the contractor; the court has power, also, to adjudge costs against the owner to the co-defendant's lienors.<sup>7</sup> Although a suit for foreclosure of a mechanics' lien is equitable on its

<sup>1</sup> *Eagleson v. Clark*, 2 E. D. Smith, 644.

<sup>2</sup> *Huxford v. Bogardus*, 40 Abb. Pr. (N. Y.) 94.

<sup>3</sup> *Seabrook v. Swarthmore* Col., 65 Penn. 74.

<sup>4</sup> *Bailey v. Johnson*, 1 Daly (N. Y.), 61.

<sup>5</sup> *Morgan v. Stevens*, 6 Abb. (N. Y.) N. Cas. 356.

<sup>6</sup> [*Read v. Gillespie*, 64 Tex. 42.]

<sup>7</sup> [*Kenney v. Apgar*, 93 New York, 539.]

nature yet the prevailing party recovers full costs as a matter of right.<sup>1</sup> The chancery rules as to costs do not apply in mechanics' lien cases. These are governed by statute rules.<sup>2</sup> Costs are controlled by the statute in force at the termination of the action.<sup>3</sup> Under Chapter 342, of 1885, the court awards the costs in lien suits in its discretion.<sup>4</sup> The contractor's surety is liable to the owner for the court costs arising in the lien suit,<sup>5</sup> and the better opinion is, that he is liable also for the costs of advertisement and sale of the property to satisfy the lien, though the majority of the court held otherwise.<sup>6</sup> A land-owner compelled to appear in a suit by a sub-contractor, and who discloses the amount he owes the contractor and offers to pay it to whomsoever it shall be adjudged due, — it being claimed by the contractor's assignee as well as by the sub-contractor, — is entitled to his costs.<sup>7</sup> The allowance of attorney's fees as costs under the Florida lien law of 1868, as amended in 1877, was held error. The law of 1885 gives the lienor reasonable attorney's fees paid in sustaining liens arising under that act (of 1885).<sup>8</sup> In California a reasonable counsel fee, on appeal to the supreme court, is allowed the lienor, on foreclosure of his lien.<sup>9</sup> But such fees are not a part of the costs. They are an incident to the lien, and if the latter is at last a failure in the re-trial, the attorney's fees, in a former successful appeal to the supreme court, are not recoverable.<sup>10</sup>

§ 468. **When not.** — Where a question is new under a mechanics' lien law, the court will not always allow costs to the successful party,<sup>11</sup> upon the construction of an obscure or unintelligible statute,<sup>12</sup> when the motion or defence is made in good faith.<sup>13</sup> So, if a party has acted upon the apparent determination or decision of a court in precedent cases.<sup>14</sup> When the proceeding is strictly *in rem*, and execution can be levied only

<sup>1</sup> [George v. Everhart, 57 Wis. 397. The revision of the statutes changes the law from what it was when Marsh v. Fraser, 27 Wis. 596, and Tewksbury v. Bronson, 48 Wis. 581, were decided.]

<sup>2</sup> [Kipp v. Massin, 15 Bradw. 300, 304.]

<sup>3</sup> [Fargo v. Helmer, 43 Hun, 1.]

<sup>4</sup> [Id.]

<sup>5</sup> [Lafayette Bldg. Ass. v. Kleinhoffer, 40 Mo. App. 389, 400.]

<sup>6</sup> [Id. 400, 401.]

<sup>7</sup> [Bourget v. Donaldson, 83 Mich. 478.]

<sup>8</sup> [McCarty v. Havis, 23 Fla. 508, 512.]

<sup>9</sup> [West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 281; Clark v. Taylor, 91 Cal. 552.]

<sup>10</sup> [McIntyre v. Trautner, 78 Cal. 449, citing Rapp v. Spring Valley Gold Co., 74 Cal. 532; Schallert-Ganahl L. Co. v. Neal, 94 Cal. 192.]

<sup>11</sup> [McSorley v. Hogan, 1 Code Rep. N. S. (N. Y.) 285.]

<sup>12</sup> [Cronk v. Whittaker, 1 E. D. Smith, 647.]

<sup>13</sup> [Welch v. Mayor of New York, 19 Abb. Pr. (N. Y.) 132.]

<sup>14</sup> [Foster v. Skidmore, 1 E. D. Smith, 719.]

against the specific property, and during its pendency the property is sold on an older lien, and the proceeds absorbed thereby, the further prosecution of the proceedings will be stayed as fruitless, and the court will not aid either party in recovering costs by permitting the case to go to trial.<sup>1</sup> Where the action to enforce the lien was equitable, it was held that the costs, as in all such actions, were within the discretion of the court.<sup>2</sup> If the costs be discretionary with the court, it has in one case, where the party recovered less than he claimed, subjected each party to the payment of his own costs.<sup>3</sup> So, where the matter of costs was left entirely to the discretion of the court, and contractors were denied their lien on ground of a trustee having no power to create it, the court refused to impose the costs on them.<sup>4</sup> Defendant encumbrancers, not being in fault, are not liable for costs.<sup>5</sup> As, where the foreclosure is against an executor or administrator, and the claim has not been unreasonably resisted or neglected, the court may properly refuse costs.<sup>6</sup> Persons claiming to intervene in behalf of their own interests, but who are not legally entitled to become parties to the proceeding, are not entitled to costs.<sup>7</sup> Act No. 147, Michigan laws of 1887, providing for the taxation of a five dollar attorney's fee as part of plaintiff's costs in a log-lien suit, etc., is unconstitutional, but the illegal taxation will not invalidate the judgment nor the lien.<sup>8</sup> Where the defendant agreed to pay \$875, and B., to whom the premises were to be conveyed, promised to pay \$725, and B. refused to pay as agreed when the work was done, and the plaintiff refused the \$875 tendered by defendant, and brought suit for a lien to the extent of the entire amount, \$1000, a judgment against him for costs was held right. The defendant cannot be made to pay the debt of B.<sup>9</sup>

<sup>1</sup> Matlack v. Deal, 1 Miles (Penn.), 254.

<sup>2</sup> Spruhen v. Stout, 52 Wis. 517; Burn v. Whittlesey, 2 MacArthur (D. C.), 189.

<sup>3</sup> Kaye v. Bank of Louisville, 9 Dana (Ky.), 261.

<sup>4</sup> Herbert v. Herbert, 57 How. Pr. (N. Y.) 336.

<sup>5</sup> Close v. Hunt, 8 Blackf. (Ind.) 254; Troth v. Hunt, Id. 580.

<sup>6</sup> Marryatt v. Riley, 2 Abb. N. Cas. (N. Y.) 119.

<sup>7</sup> Holden v. Winslow, 19 Penn. St. 449.

<sup>8</sup> [Chair Co. v. Runnels, 77 Mich. 105.]

<sup>9</sup> [Smith v. Iowa City L. & B. Ass., 60 Iowa, 164.]

PART II.

MECHANICS' LIEN

ON

PERSONAL PROPERTY.





## PART II.

### MECHANICS' LIEN ON PERSONAL PROPERTY.

#### CHAPTER XLVI.

##### NATURE OF THE LIEN.

§ 469. **Signification of Term "Lien."**—The term "lien," as used in the various branches of the law, has a most comprehensive signification, and is employed to designate various charges upon real and personal estate, either at common law, in equity, in admiralty, or those created by special statute.<sup>1</sup> At common law, it is defined to be a right in one man to retain personal property in his possession belonging to another, until certain demands of him, the person in possession, are satisfied.<sup>2</sup> In courts of equity, the term "lien" is used as synonymous with a charge or encumbrance upon a thing, where there is neither *jus in re* nor *ad rem*, nor possession of the thing. In maritime courts, liens exist independently of possession, either actual or constructive. Statutory liens are *sui generis*, and may arise under any circumstances provided by law. For the most part the latter signify a charge enforceable either at law or in equity, as provided in their creation.<sup>3</sup> The word "lien" will, when the context of a contract requires it, be construed as a "claim" or "demand," and not in its technical sense.<sup>4</sup>

§ 470. **General and Particular Liens.**—At common law there have been known from time immemorial two kinds of liens on chattels, — general and particular liens. General liens are claimed in respect of a general balance of account. They were

<sup>1</sup> Donald v. Hewitt, 33 Ala. 534; Oakes v. Moore, 11 Shepley (Me.), 214.

<sup>2</sup> Hammonds v. Barclay, 2 East, 235; McCaffrey v. Wooden, 62 Barb. (N. Y.) 316. Ch. J. Shaw defined a lien to be a right to the custody of the property of another, with the right to hold and retain the same against the general owner as indemnity, or for security for some debt or

obligation. Sumner v. Hamlet, 12 Pick. (Mass.) 76. By the civil law, a lien, *jus retentionis*, is a right to detain a thing until a demand is satisfied. Lindley's Thibaut, § 232.

<sup>3</sup> Peck v. Jenness, 7 How. (U. S.) 612.  
<sup>4</sup> Stone v. Browning, 49 Barb. (N. Y.) 244.

founded in custom or special contract. Particular liens are where persons claim a right to retain certain chattels in respect of labor or money expended upon them.<sup>1</sup> Bankers, factors, brokers, and wharfingers are entitled to a general lien for the balance of their accounts;<sup>2</sup> and in certain instances, by proof of custom in particular localities, this lien has been extended to calico-printers<sup>3</sup> and dyers.<sup>4</sup> General liens are, *stricti juris*, deemed encroachments on the common law, and not favored;<sup>5</sup> while, on the other hand, particular liens are considered beneficial to trade, consonant to natural justice, and courts lean in favor of them.<sup>6</sup> Particular liens are even more favored now than formerly; for at present it is recognized as a general principle that wherever a bailee has, by his labor or skill, etc., improved, at the request of the owner, the value of property placed in his possession, he has a lien upon it until paid. The existence of liens is also sustained where they contribute to promote public policy and convenience.<sup>7</sup>

§ 471. **Mechanics' Lien, when Particular and when General by Usage and Implied Contract.**—The lien of a mechanic on chattels, at common law, independent of contract, expressed or implied, was particular. A tradesman's lien is not a general lien for balance of account, but a specific lien upon the identical property upon which labor or expense is bestowed, and only gives him a right to retain the property in his possession until the charges for the work and expenses upon the identical property are paid.<sup>8</sup> Accordingly, it has been held that a dyer has a lien upon an article delivered to him to be dyed only for the particular price of dyeing that article, and not for his general balance.<sup>9</sup> So a fuller has no lien for his general balance upon cloths sent to be dressed.<sup>10</sup> Where dyers, in consequence of special custom, were found by verdict to have no lien for their general balance, they could not retain for the price of dyeing any other than the particular goods dyed; or, at most, only for the dyeing of such as were delivered to them at one and the same time under one entire contract.<sup>11</sup> A mechanic, however, may become entitled to

<sup>1</sup> Houghton v. Matthews, 3 Bos. & Pull. 485.

<sup>2</sup> Savill v. Barchard, 4 Esp. 53.

<sup>3</sup> Weldon v. Gould, 3 Esp. 268; Webb v. Fox, Peake Add. Cas. 167.

<sup>4</sup> Savill v. Barchard, 4 Esp. 53.

<sup>5</sup> Houghton v. Matthews, 3 Bos. & Pull. 485; Taylor v. Baldwin, 10 Barb. (N. Y.) 626.

<sup>6</sup> Rushforth v. Hadfield, 7 East, 224;

<sup>7</sup> Burr. 2121; Jackson v. Cummins, 5 M. & W. 342.

<sup>8</sup> Wilson v. Guyton, 8 Gill (Md.), 215.

<sup>9</sup> Moulton v. Greene, 10 R. I. 330.

<sup>10</sup> Bennett v. Johnson, 2 Chitty, 455; s. c. 3 Doug. 387.

<sup>11</sup> Rose v. Hart, 8 Taunt. 499.

<sup>12</sup> Close v. Waterhouse, 6 East, 523, note (c).

a general lien, either by implied or express contract. Thus, an agreement among dyers at a public meeting not to receive goods except on condition of a lien for general balance, is good in law; and all who deal with notice must be taken to assent to those terms.<sup>1</sup> A right, partaking of some of the characteristics of a general lien, but confined to the same transaction, may also arise from the nature of the contract or service performed. Thus, a printer employed to print certain numbers, but not all consecutive, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole. Upon the same principle a tailor who is employed to make a suit of clothes, has a lien for the whole price upon any part of them. The nature of the work in each instance affords a reason for his general lien.<sup>2</sup> The lien in these cases extends to all the goods delivered under one contract, and is not confined to the particular portion on which the labor has been bestowed. Accordingly, where a quantity of logs were delivered on different days at the defendant's saw-mill upon an agreement to saw the whole quantity into boards, and the defendant sawed a part of them, and delivered the boards to the bailor, without being paid for the service, he had a lien for the amount of his account upon the residue of the logs in his possession.<sup>3</sup> When a custom is set up by a class of mechanics as justifying a general lien, it must be universal and reasonable, in order to control the rule of the common law.<sup>4</sup> As where printers claim a lien on plates for their bills for printing from them, they must, to establish it, show a course of dealing so general and uniform that persons must be supposed to contract tacitly on the existence of such a usage.<sup>5</sup> In Georgia a general laborer's lien on personalty attaches to all property of the debtor. No items of his property need be specified in the affidavit. Money resulting from the sale of personalty by the sheriff is covered by the lien.<sup>6</sup>

§ 472. **Express Contract for General Lien.** — Notwithstanding the lien of the mechanic is particular at common law, he may nevertheless extend his rights, by force of an express agreement, to a general lien. The law does not impose any obligation on an artificer, as in the cases of common carriers and innkeepers, to do labor upon or repair the chattels of another. He may

1 Kirkman v. Shawcross, 6 Durn. & E.  
14.

2 Blake v. Nicholson, 3 M. & S. 167.

3 Morgan v. Congdon, 4 Comst. (N. Y.)  
552.

4 Smith v. Aikmans, 22 Show. Cas.  
(2d ser.) 344; Leuckhart v. Cooper, 2  
Hodg. 150; s. c. 3 Bing. N. C. 99.

5 Bleaden v. Hancock, 4 C. & P. 152.

6 [Allred v. Haile, 84 Ga. 570.]

refuse at his pleasure, without being liable to an action therefor; or, if he accept the bailment for work, he may impose such conditions by express agreement as in his own judgment will be a complete indemnity to him for the service to be performed. Indeed, it need not necessarily appear that the employers have expressly assented to the contract enlarging the lien. It is sufficient in this, as in other instances, if it be shown that they were aware of the demand of the mechanic, and dealt with him under such circumstances as to fairly indicate they intended to assent thereto. As where certain artificers passed a resolution or published a notice, that all work thereafter done should be subject to a general lien, and it is shown that the owners of chattels, with knowledge thereof, dealt with them thereafter, a claim of lien for the general balance was held to be legal and binding upon the parties.<sup>1</sup>

§ 473. **Definition of Mechanics' Lien.** — A mechanics' lien upon chattels is a right to retain in his possession a chattel the property of another, where he has bestowed his money or skill and materials upon it in the alteration and improvement of its properties, or for the purpose of imparting an additional value to it, until he has been paid a fair and reasonable remuneration for the service performed, or the contract price, if it has been fixed by agreement.<sup>2</sup> It is a mere right to hold for the purpose of security, subject to the call of the owner, and will be forfeited by any act or declaration at variance with his rights, or inconsistent with the continuance of the lien.<sup>3</sup> The chattel must be the property of another, as no man can have a lien on his own goods,<sup>4</sup> but the possession must be in the lienor. The lien cannot arise without delivery of possession, and the moment it is voluntarily surrendered the lien is gone.<sup>5</sup> It is equivalent to a security created by contract<sup>6</sup> or mortgage, and will enable the lienor to redeem it from antecedent liens. It arises as well against a solvent as an insolvent employer.<sup>7</sup>

§ 474. **Origin of.** — The right of lien at common law was originally confined to cases where persons, from the nature of their occupation, were under obligation, according to their means, to receive and be at trouble and expense about the per-

<sup>1</sup> *Kirkman v. Shawcross*, 6 T. R. 14.

<sup>2</sup> *Chase v. Westmore*, 5 M. & S. 180; *Ruggles v. Walker*, 34 Vt. 470; *Downer v. Brackett*, 21 Vt. 602; *Oakes v. Moore*, 11 Shepley (Me.), 214.

<sup>3</sup> *Bean v. Bolton*, 3 Phila. 87; *Hunter v. Leake*, 7 L. J. K. B. 221.

<sup>4</sup> *Arnold v. Delano*, 4 Cush. (Mass.) 33.

<sup>5</sup> *Oakes v. Moore*, 11 Shepley (Me.), 214; *McCaffrey v. Wooden*, 62 Barb. (N. Y.) 316.

<sup>6</sup> *Richards v. Plattel*, 5 Jur. 834.

<sup>7</sup> *Fieldings v. Mills*, 2 Bosw. (N. Y.) 489.

sonal property of others, and was limited to certain trades and occupations necessary for the accommodation of the public, such as common carriers, innkeepers, farriers, and the like. But in modern times the right has been extended so far that it may now be laid down as a general rule, to which there are few exceptions, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods of another, has a lien upon the property for his reasonable charges in relation to it and a right to retain it in his possession until those charges are paid. This includes all such mechanics, tradesmen, and laborers, as receive property for the purpose of repairing, cleansing, or otherwise improving its condition.<sup>1</sup> There is no doubt that the law of this lien was brought to this country by our ancestors, and that it is a part of our common law. It was as proper for their condition and circumstances here as it had been in the parent land.<sup>2</sup> A similar right existed under the Roman law.<sup>3</sup>

§ 475. **Equity of.** — The equity of the mechanic to this lien arises from the fact that he has bestowed his labor and means<sup>4</sup> upon the article at the instance and in the manner directed by the owner.<sup>5</sup> Thus, a lien exists in respect of corn that has been measured, because it has passed through a process by which it has been actually increased in value, or is so considered. So an ingot of gold that has been assayed is thereby rendered more valuable, as its quality has been ascertained and it would more readily find a purchaser.<sup>6</sup> The services of laborers on a plantation inure directly to the benefit of those having liens or privileges upon the crop, in preserving the thing upon which their mortgages and privileges rest, and therefore they are entitled to an equitable as well as a statutory lien on the proceeds of the crop; but they in nowise benefit the owner of the land, and their wages have no equitable lien whatever against him.<sup>7</sup> There need, however, be no appreciable increased value communicated to the chattel in consequence of the labor bestowed. The mechanic is not answerable for the results of his labor, provided it be done as directed, and in a skilful manner.<sup>8</sup> There is no lien where no service has been performed.<sup>9</sup>

<sup>1</sup> *Wilson v. Martin*, 40 N. H. 88; *Jackson v. Cummins*, 5 M. & W. 349; *Naylor v. Mangles*, 1 Esp. 109.

<sup>2</sup> *M'Intyre v. Carver*, 2 Watts & S. 552. (Penn.) 392.

<sup>3</sup> *Gayarre v. Tunnard*, 9 La. An. 254.

<sup>4</sup> *Chase v. Westmore*, 5 M. & S. 188.

<sup>5</sup> *Townsend v. Newell*, 14 Pick. (Mass.) 332.

<sup>6</sup> *Steadman v. Hockley*, 15 M. & W.

<sup>7</sup> [*Rogers v. Walker*, 24 Fed. R. 344.]

<sup>8</sup> *Steinman v. Wilkins*, 7 Watts & S.

466.

<sup>9</sup> *Lambert v. Robinson*, 1 Esp. 119.

§ 476. **Arises by Implication of Law.** — This right arises independently of special agreement,<sup>1</sup> having grown from the earliest times out of the usages of trade,<sup>2</sup> and exists in every case of performance of such labor, if there be no special contract inconsistent with its enforcement.<sup>3</sup> So entirely was this lien considered to be a privilege implied by law, and not the subject of express contract, that it was formerly held it did not arise on an agreement for a stipulated price for the work to be performed, but only came into existence on an implied contract to pay a reasonable price or sum.<sup>4</sup> The practice of modern times has repudiated any distinction between the two contracts, upon the ground that it is impossible to find any solid reason for saying that if a party contract with a mechanic to do a certain act for a certain sum, he shall be bound to deliver the article when the work is accomplished, without receiving the price of his labor; but if he merely deliver it, without fixing the price, the mechanic may detain it until he is paid, though probably he would demand, and the law would give him, the very same sum.<sup>5</sup> It is also well settled in the United States that the lien exists equally whether there be an agreement to pay a stipulated price or an implied contract to pay a reasonable sum.<sup>6</sup>

§ 477. **By Implication from Circumstances.** — Liens will also arise by implication when, from the nature of the transaction, the owner of property is presumed as having designed to create them, or when it can be fairly inferred from circumstances that it was the understanding of the parties that they should exist. For example, if any article of personal property has been lost or strayed away, or escaped from its owner, and he offers a certain reward, payable to him who shall recover and deliver it back to his possession, it is but a just exposition of his offer, that he did not expect that he who had expended his time and money in the pursuit and recovery of the lost or escaped property would restore it to him but upon the payment of the proffered reward, and that as security for this he was to remain in possession of the same until its restoration to its owner, and then the payment of the reward was to be a simultaneous act. It is no forced construc-

<sup>1</sup> *Pierce v. Sweet*, 33 Penn. 151.

<sup>2</sup> *Fieldings v. Mills*, 2 Bosw. (N. Y.) 489; *Hodgdon v. Waldron*, 9 N. H. 66.

<sup>3</sup> *Morgan v. Congdon*, 4 Const. (N. Y.) 552; *Hanna v. Phelps*, 7 Ind. 21.

<sup>4</sup> 2 *Rol. Abr.* 92; *Collins v. Ougly*, Selw. N. P. 1280; *Brenan v. Currant*, Sayer, 224.

<sup>6</sup> *Chase v. Westmore*, 5 M. & S. 180;

*Wolf v. Summers*, 2 Camp. 631; *Hutton v. Bragg*, 2 Marshman, 339; *Crawshay v. Homfray*, 4 B. & Ald. 50.

<sup>5</sup> *Peyroux v. Howard*, 7 Pet. (U. S.) 324; *Hanna v. Phelps*, 7 Ind. 21; *Rugles v. Walker*, 34 Vt. 470; *Pinney v. Wells*, 10 Conn. 104; *Curtiss v. Jones*, 1 How. (N. Y. Ct. App.) 149.

tion of his act to say that he designed it to be so understood by him who should become entitled to the reward. It is, consequently, a lien created by contract. It is for the interest of property-holders so to regard it. It doubles their prospect of a restoration to their property. To strangers it is everything; for few, indeed, would spend their time and money, and incur the risks incident to bailment, but from the belief in the existence of such a lien. Not so, if no fixed or certain reward is offered, but only to pay "a liberal reward." In such case neither party is the sole judge as to what is reasonable and just. In the event of a difference between them upon the subject the amount to be paid must be ascertained by the judgment of the appropriate tribunal. This involves delays, and it would be a gross perversion of the intention of the owner to infer, from his offered reward, an agreement on his part that he was to be kept out of the possession of his property till all the delays of litigation were exhausted. To the bailee thus in possession of property such a lien would rarely be valuable, except as a means of oppression and extortion.<sup>1</sup> So, where a party mingles his goods with those on which a lien exists, that they cannot be distinguished, the whole become subject to the lien; not so, if mingled with the assent of the lien-holder: they would become tenants in common.<sup>2</sup>

§ 478. **Contract.** — The right to create a lien by contract, where none existed by law, is unquestionable. The maxim, *conventio vincit legem*, is entirely applicable.<sup>3</sup> Personal and even transitory and fluctuating property may be made the subject of a lien at the pleasure of the contracting parties. It is best that explicit words should be used to effect that purpose, where such lien is not raised by operation of law.<sup>4</sup> But where there is a good consideration for a lien, it is entirely immaterial what may be the form of the transaction. The real nature of the transaction for lien, and not the mere form of it, must decide the right.<sup>5</sup> An agreement for a lien is a lien in equity, when it is clear that it was the intention of the parties to give or create such lien, and will be preferred to the claims of persons having notice.<sup>6</sup> Even a general lien, as we have seen,<sup>7</sup> may be created

<sup>1</sup> *Wilson v. Guyton*, 8 Gill (Md.), 215; *Wentworth v. Day*, 3 Metc. (Mass.) 352; *Cummings v. Gann*, 52 Penn. St. 484. *Vide*, as to lien where reasonable reward is offered, *Baker v. Hoag*, 5 Barb. (N. Y.) 113. There is no lien in case of finding, when no reward is offered. *Nicholson v. Chapman*, 2 H. Bl. 254.

<sup>2</sup> *Dunning v. Stearns*, 9 Barb. (N. Y.) 630.

<sup>3</sup> *Baker v. Hoag*, 5 Barb. (N. Y.) 113.

<sup>4</sup> *Williams v. Price*, 5 Munf. 507.

<sup>5</sup> *Malcolm v. Scott*, 8 Jur. 283.

<sup>6</sup> *Seymour v. C. & N. R. R.*, 25 Barb. (N. Y.) 284.

<sup>7</sup> Section 472.

in favor of a mechanic by a particular stipulation; but in such case, when contrary to the course of the common law, the claim must fall clearly within the terms of the agreement. Thus, a stipulation by scribbling and fulling millers that all goods on hand should be subject to a lien for a general balance, has been held not to include oil and dyeing materials, but only the wool.<sup>1</sup> So where a railway company established a condition that it should "have the right at any time to detain any goods or wagons in their possession by way of lien to secure the general balance owing to them," and a colliery company had sent their locomotive to shops of the railway company to be repaired, it was held that no general lien attached upon it, as the scope of the condition extended only to coals and such like "goods," to be carried in the ordinary way, and not to an engine which was delivered, not under any contract to carry, but under an agreement to repair, to which the charge for hauling was incidental.<sup>2</sup> The effect of an express antecedent contract between the parties is to prevent an implied lien arising inconsistent with its terms.<sup>3</sup> And it seems that where a lien by agreement is set up, a lien at common law can be relied upon, if the agreement be negatived.<sup>4</sup>

§ 479. **Possession is essential to Lien.** — Possession, in the absence of express agreement, is essential either to the creation or continuance of a lien.<sup>5</sup> It is as necessary for the existence of that of the manufacturer and artisan as for other liens. At common law there could be no lien where there was no possession.<sup>6</sup> Being in the nature of a security resting on property for the payment of a debt, it cannot be separated either from the possession of the goods or from the debt; it is collateral to the debt, and it must accompany the possession.<sup>7</sup> It is but an incident to possession.<sup>8</sup> The general rule of the civil law was, that possession of movables was not necessary to the validity of a lien, whether created by contract or act of law, and that such lien would attach upon movable property, even in the hands of a *bona fide* purchaser without notice. The latter part of this rule has been modified by some of the continental nations which adopted the Roman civil law as the foundation of their jurisprudence, to the extent that, if the goods left in the possession of

<sup>1</sup> *Cumpston v. Haigh*, 2 Bing. N. C. 449.

<sup>2</sup> *Kinnear v. Midland R. R.*, 19 L. T. N. S. 387.

<sup>3</sup> *Stevenson v. Blakelock*, 1 Maule & S. 535.

<sup>4</sup> *Jackson v. Cummings*, 5 M. & W. 342.

<sup>5</sup> *Walcott v. Keith*, 22 N. H. 196; *Heywood v. Waring*, 4 Camp. 291.

<sup>6</sup> *The Bold Buccleugh*, 7 Moore P. C. 267.

<sup>7</sup> *Whitney v. Peay*, 24 Ark. 22.

<sup>8</sup> *Kimball v. Ship Anna*, 2 Cliff. C. C. 4.



the owner be sold or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value; but the contract is binding on the debtor, and the goods themselves may be taken if they remain in his hands.<sup>1</sup> The rule of the common law is preferable, and more consonant with justice, as the possession of personal property is the main *indicium* of ownership,<sup>2</sup> and suffering the owner to remain in possession would enable him to defraud others ignorant of the lien.<sup>3</sup>

§ 480. **Possession must be Lawful.** — This possession must be a just possession, for no one can acquire a lien founded on his own illegal or fraudulent act or breach of duty.<sup>4</sup> Neither will any act be deemed to vest possession which in itself amounts to a fraud. Manufacturers, mechanics, and other bailees for hire cannot lawfully set up a lien for labor performed upon articles tortiously converted to their own use.<sup>5</sup>

§ 481. **Actual or Constructive Possession.** — Possession may be actual or constructive.<sup>6</sup> It is impossible to lay down precise rules as to what possession will support a lien. Each case must depend on itself. An exclusive possession is not in every case necessary. It is enough if such possession be held as the nature of the subject will admit. Thus, a possession which allows a contractor to use the articles in the performance of work on the premises of the party claiming the lien, and which is the best under the circumstances, is sufficient to support a lien.<sup>7</sup> So the premises of the owner may be constituted the possession of the lien-holder by agreement.<sup>8</sup> But a person employed to cut wood under the superintendence of the manager of an employer, and who has not actual possession of the wood, has no right of lien or retention for payment of his wages.<sup>9</sup> So a manufacturer of brick, made for and burnt on the land of another, but of which the manufacturer has no lease, and no other interest than a right to enter and make the brick, has no such possession of the brick as to give him a lien thereon for his labor.<sup>10</sup> So one employed to dig ore has no lien upon the ore dug for his wages.<sup>11</sup> Constructive possession exists when the article is in the care of an agent or servant acting under the authority of the mechanic,

<sup>1</sup> *Tatham v. Andree*, 2 New R. 554.

<sup>2</sup> *Taintor v. Williams*, 7 Conn. 271.

<sup>3</sup> *Allen v. Spencer*, 1 Edm. 117.

<sup>4</sup> *Randel v. Brown*, 2 How. (U. S.)

406.

<sup>5</sup> *Hotchkiss v. Hunt*, 49 Me. 213.

<sup>6</sup> *Kollock v. Jackson*, 5 Ga. 153.

<sup>7</sup> *Crowfoot v. London Dock Co.*, 2 Cr.

& M. 637; *Wilson v. Little*, 2 Comst. (N. Y.) 443.

<sup>8</sup> *Martin v. Reid*, 11 C. B. N. s. 730.

<sup>9</sup> *Callum v. Ferrier*, 1 Scotch App. Cas.

(W. & S.) 399.

<sup>10</sup> *King v. Indian Orchard Canal Co.*, 11 Cush. (Mass.) 231.

<sup>11</sup> *Ritter v. Gates*, 1 Am. L. Reg. 119.

and is regarded as his own.<sup>1</sup> Accordingly, delivering goods to another for safe keeping does not destroy the lien;<sup>2</sup> or they may be removed from the premises of the lien claimant and placed under the control of a third person, with notice of the lien, and it will be protected.<sup>3</sup> So it is no waiver of a lien, for one mechanic who is repairing an article to send it to another mechanic for other necessary work; when returned, the lien revives. Nor to allow the owner to remove a part of it to a highway for inspection, he afterwards returning it.<sup>4</sup> The question of possession, and the intention with which goods are received or parted with, is always a matter of fact for the jury.<sup>5</sup>

§ 482. **Possession may be waived by Agreement.** — Liens created by contract may stipulate the mode in which the lien shall be effectuated, continued, or rescinded; and the intent of the parties in such case must prevail, unless prohibited by rules of law.<sup>6</sup> Parties have a right to create a charge or lien for repairs on a thing, which is to exist independent of possession.<sup>7</sup> As where a contract stipulated that a lien was to be reserved upon a steamboat, it will be implied that possession was not contemplated when the boat was still to be used.<sup>8</sup> So, where a party had a cow at grass in another's field, and, being indebted on that account, agreed that a lien should exist on her, wherever she might be, until the debt was paid. The owner removed the cow, the debt not being paid; the lien of the agistor was not displaced, and he had a right to seize her, notwithstanding the removal.<sup>9</sup> A contract providing for a lien independent of possession as a security for a debt has every characteristic of an equitable chattel mortgage.<sup>10</sup> In another case, where a coach was made under an agreement that the maker should have a claim upon the coach until a bill of exchange at six months was paid, and possession was delivered to the purchaser, this was held to be a mere license to resume possession and retain the coach if the bill was not paid. But such a right will not prevail against *bona fide* purchasers.<sup>11</sup> Delivery, if made upon an understanding that it shall not be regarded as a waiver of lien, will

<sup>1</sup> Allen v. Spencer, 1 Edm. 117.

<sup>2</sup> Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670.

<sup>3</sup> McFarland v. Wheeler, 26 Wend. (N. Y.) 467.

<sup>4</sup> Milburn v. Milburn, 4 Up. Can. 179.

<sup>5</sup> Crowfoot v. London Dock Co., 2 Cr. & M. 637; Bernal v. Pym, 1 Gall. 17.

<sup>6</sup> Sawyer v. Fisher, 32 Me. 28.

<sup>7</sup> Spalding v. Adams, 32 Me. 211; Allen v. Spencer, 1 Edm. 117.

<sup>8</sup> Donald v. Hewitt, 33 Ala. 534; Dunning v. Stearns, 9 Barb. (N. Y.) 630.

<sup>9</sup> Richards v. Symonds, 8 Ad. & E. N. s. 90.

<sup>10</sup> Donald v. Hewitt, 33 Ala. 534.

<sup>11</sup> Howes v. Ball, 7 B. & C. 481.

not have that effect,<sup>1</sup> except as to them. So, if persons part with the possession of property, as where the owners of a saw-mill permitted boards sawed by them at a stipulated price to be removed from their mill-yard, they lose their lien in respect to third persons, although it is expressly stipulated between the parties that the lien shall continue notwithstanding the removal.<sup>2</sup> So, if it be agreed that the lien shall be renewed by a return of property, it will nevertheless be subordinate to any intervening encumbrance which has in the mean time attached.<sup>3</sup> To protect the lien against *bona fide* purchasers, a conditional bill of sale or chattel mortgage should be executed, acknowledged, and recorded, according to statutory provisions.

§ 483. **Possession must be continuous.** — Possession must be continuous. Any interruption, of however so short a period, defeats the lien.<sup>4</sup> Where the agreement is either express or implied that this continuity may be broken by the owner, no lien arises. Thus, the labor and skill employed on a race-horse by a trainer, in training him, are a good foundation for a lien;<sup>5</sup> but if by usage or contract the owner may send the horse to run any race he chose, and may select the jockey, the trainer has no continuing right of possession, and, consequently, no lien.<sup>6</sup> The right of the owner to take possession, though for temporary purposes, is equally fatal.<sup>7</sup> A mechanic, having repaired a carriage for a party, allowed it to remain in his yard; but the owner had frequently taken it out of the yard and returned it. The mechanic could not afterwards detain it for the amount of repairs.<sup>8</sup>

§ 484. **Right of Possession without Power of Sale.** — A lien is a mere right of possession;<sup>9</sup> a personal right, which cannot be parted with; nor can the property be transferred by the bailee over which the lien extends.<sup>10</sup> A lien, therefore, confers no right of sale<sup>11</sup> upon the person having such lien, although the retention of the chattel may be attended with expense.<sup>12</sup> It is a limited privilege; and a sale of the property without authority forfeits it, and passes no title. The chief benefit to be derived therefrom is by way of protection against trespass or replevin in

<sup>1</sup> Kimball v. Ship Anna, 2 Cliff. C. C. 4; Bigelow v. Heaton, 4 Den. (N. Y.) 496.

<sup>2</sup> McFarland v. Wheeler, 26 Wend. (N. Y.) 467.

<sup>3</sup> Perkins v. Boardman, 14 Gray (Mass.), 481.

<sup>4</sup> Walcott v. Keith, 22 N. H. 196.

<sup>5</sup> Bevan v. Waters, 3 C. & P. 520.

<sup>6</sup> Forth v. Simpson, 13 Ad. & E. N. S. 680.

<sup>7</sup> Id.

<sup>8</sup> Hartley v. Hitchcock, 1 Stark. 408.

<sup>9</sup> Gurr v. Cuthbert, 12 L. J. Ex. 309.

<sup>10</sup> Ruggles v. Walker, 34 Vt. 470.

<sup>11</sup> Cazenove v. Prevost, 5 B. & Ald. 70.

<sup>12</sup> The Thames Iron-work Co. v. The Patent Derrick Co., 6 Jur. N. S. 1013.

favor of the owner.<sup>1</sup> If it be said that a right to retain the goods without the right to sell is of little or no value, it may be answered that it is certainly not so adequate a security as a pledge with a power of sale; still it is to be considered that both parties have rights which are to be regarded by the law, and the rule must be adapted to general convenience. In the greater number of cases the lien for work is small in comparison with the value to the owner of the article subject to lien, and in most cases it would be for the interest of the owner to satisfy the lien and redeem the goods, as in the case of the tailor, coachmaker, innkeeper, carrier, and others; whereas many times it would cause great loss to the general owner to sell the suit of clothes or other articles of personal property. But, further, it is to be considered that the security of this lien, such as it is, is super-added to the holder's right to recover for his services by action. And if the transaction be a large one, and of such a character as to require further security, it may be provided for by an express stipulation for a power of sale, under such limitations as the particular circumstances of the case may indicate as suitable to secure the rights of all parties concerned.<sup>2</sup> In the event of a wrongful sale, the lien-holder is liable in trover, having thereby destroyed his lien.<sup>3</sup> The absence of this right to sell constitutes a distinguishing difference between a simple lien and a pawn or pledge.<sup>4</sup> The pawnee has a right to sell the pawn where there has been a default in the pawner; if there be no stipulated time when the debt shall be paid, the pawnee may always sell upon demand and notice, *ex mero motu*, or he may file a bill in equity for foreclosure and sale.<sup>5</sup> The old rule even as to pledges, existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary.<sup>6</sup> Another reason given why the property may not be sold is, that at common law the lien of a bailee for services lasts only while he retains the possession. His relation to the bailor, the owner of the chattel, is a personal one, and grows out of the confidence the bailor is presumed to repose in the skill and fidelity of his bailee, when entrusting his property to him for the service intended to be performed upon or toward it. The law implies a contract on the part of the bailee to perform the ser-

<sup>1</sup> Coit v. Waples, 1 Minn. 134.

<sup>2</sup> Doane v. Russell, 3 Gray (Mass.), 384.

<sup>3</sup> Siebel v. Springfield, 3 New R. 36.

<sup>4</sup> Doane v. Russell, 3 Gray (Mass.), 384.

<sup>5</sup> Hall v. Page, 4 Ga. 443; Donald v. Suckling, L. R. 1 Q. B. 585; Martin v. Reid, 11 C. B. N. s. 730.

<sup>6</sup> Stearns v. Marsh, 4 Den. (N. Y.) 227.

vice skilfully, and then to return the chattel faithfully on payment for his service. Hence, if he sell or pawn it away, he is guilty of a breach of his fidelity to the bailor, and at once forfeits his right of lien. But when there is a statute which gives to the bailee the power to sell the property at auction in order to enforce his lien, it introduces a change in the relation of the parties which relieves the bailee from the duty that requires constant possession as the means of enforcing his lien. The property in his hands then becomes a security for his claim, with the means of enforcing payment. The property is thus capable of transfer to any one who would bid for it in the due course of procedure. The relation between the parties is thus changed in its most important and peculiar feature. Where, however, a party does not pursue the requirements of the statute in making public sale after notice to the owner, the sale does not carry the title. Yet, in view of the change wrought by such a statute, the sale is a transfer of the chattel and of the claim itself, and there seems to be no good reason why a transfer of the debt or charge upon the property, together with the possession of the property, should not effect a substitution of the purchaser to the right of the bailee to receive the money, and to retain the security until payment, where the sale and transfer have been *bona fide*, and there has been no fraud or abuse of the owner's property. The purchaser could in such case give the owner an acquittance for the debt, and has the same right to proceed to demand and enforce payment after notice as the bailee had. The rights of the owner are unchanged as they existed in the bailee, and he can demand and receive his property on the same terms he could from the bailee.<sup>1</sup> A right of sale may also be implied when a lien is given for the public benefit.<sup>2</sup> A creditor who has a lien with power of sale may, if he sell and only realize half his debt, sue for the residue.<sup>3</sup>

§ 485. **Personal Right, which cannot be assigned.** — The special trust the owner of a chattel places in the mechanic whom he entrusts with its possession, and which prevents a sale of it for the enforcement of the lien, further operates to prevent a sale or transfer of the right of lien, inasmuch as there can be no transfer of this right without an accompanying possession of the chattel. It was early decided that a lien is a personal right,

<sup>1</sup> *Rodgers v. Grothe*, 58 Penn. 414.

<sup>2</sup> *King v. Speed*, 1 Salk. 379.

<sup>3</sup> *Nelson v. Couch*, 2 New R. 395. A right of lien does not prevent suit and

recovery of judgment on the indebtedness for which the lien is collateral security. *Hill v. Manchester*, 2 B. & Ad. 544.

and cannot be transferred to another,<sup>1</sup> and is now well established.<sup>2</sup> In this, again, it differs from a pawn, which may be assigned with the debt secured.<sup>3</sup> The lien, as a consequence, can only be enforced by the party entitled, or by his express authority.<sup>4</sup> The executor, however, of a lien-holder may retain goods which were in the hands of his testator for the lien of the latter on them.<sup>5</sup> It is so far a mere personal right, which cannot be parted with, that a sheriff cannot take in execution goods which the debtor holds in respect of a lien only. And this because a sheriff can seize only what he can sell. A sale by him would destroy the right.<sup>6</sup> When allowed by special statute, the owner of a lien may assign his right to the debt, he at the same time retaining possession of the property.<sup>7</sup>

§ 486. **Rights of General Owner.** — The effect of the lien is not to disturb the rights of property in the general owner; they remain intact, except so far as is necessary to support the lien. It does not prevent alienation.<sup>8</sup> It may be an embarrassment to such a purpose, and may frustrate it, but does not prohibit it. The owner may even sell the chattel with an agreement that the price be applied in discharge of the lien, and no creditor can object. The title of the purchaser is necessarily in subordination to the lien.<sup>9</sup> The owner of goods may also inspect or show them, so long as he does nothing to interfere with the possession of the lienor.<sup>10</sup> And a party who claims to have a lien for work expended will be ordered to produce the articles for inspection in order to estimate the work done.<sup>11</sup> If the debt be paid for which a thing is pledged, it is the duty of the pledgee to account for and pay over all the income, profits, and advantages derived from the bailment.<sup>12</sup> In case of a pawn, if the pawnee be at a charge to maintain the thing pawned, as a horse, etc., he may use it in a reasonable manner, in consideration of the expense.<sup>13</sup> A lienor in every case is bound to take reasonable care of the chattel, whether living or inanimate. If living, to feed and attend it; if inanimate, such care as to protect it from the elements, or other loss and damage, as the nature of the thing requires.<sup>14</sup> Beyond

<sup>1</sup> *Daubigny v. Duval*, 5 D. & E. 604. 520; 1 Camp. 513; 2 Camp. 639; 9 Pick.

<sup>2</sup> *Ruggles v. Walker*, 34 Vt. 470; 347.

*Wing v. Griffin*, 1 E. D. Smith, 162.

<sup>3</sup> *Bradley v. Spofford*, 23 N. H. 444.

<sup>4</sup> *Jones v. Sinclair*, 2 N. H. 321.

<sup>5</sup> *Gage v. Allison*, 1 Brev. 495.

<sup>6</sup> *Legg v. Evans*, 6 M. & W. 36; s. c.

<sup>8</sup> Dowl. 177.

<sup>7</sup> *Coit v. Waples*, 1 Minn. 134.

<sup>9</sup> *Bradford v. Marbury*, 12 Ala. n. s.

<sup>9</sup> *Parsons v. Black*, 2 Grant Cas. 339.

<sup>10</sup> *Hunter v. Leake*, 7 L. J. K. B. 221.

<sup>11</sup> *Lord Brougham v. Cauvin*, 37 L. J. n. s. 691.

<sup>12</sup> *Hunsacker v. Sturgis*, 29 Cal. 142.

<sup>13</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909.

<sup>14</sup> *Scarfe v. Morgan*, 4 M. & W. 284.

this duty the chattel is at the risk of the owner,<sup>1</sup> and any injury to the right of ownership by a third party should be enforced by the owner.<sup>2</sup>

§ 487. **Rights of Property and Lien.**—An important question frequently arises as to the respective rights of property and lien of mechanic and employer in chattels to be made or manufactured. The vesting of right of property in one or the other is entirely a matter of intention of parties, to be gathered from their contract.<sup>3</sup> Subject thereto it is now well settled that where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other; although the maker may, in so doing, render himself liable to an action, still a good title is given to the party to whom they are delivered. But if a party be employed to make a chattel with the employer's materials, he who does the work has no power to appropriate the produce of his labor and the employer's materials to any other person. Having bestowed his labor at the request of the employer, on the materials of the latter, he may maintain an action against him for work and labor, and retain the property under his lien.<sup>4</sup> It is equally clear that, where the owner of a damaged or worn-out article delivers it to another person to be repaired and renovated by the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the original owner for whom the repairs were made, and not in the person making them. The agreement in such case is but the ordinary contract of bailment, — *locatio operis faciendi*; and the original owner, so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires the right to whatever accessorial additions are made in bringing it to its new and improved condition. Nor is it at all important what the value of the repairs, actual or constructive, may be. To make such a distinction is not necessary for the security of the mechanic by whom the repairs are made. The lien affords ample protection to the mechanic. Various cases<sup>5</sup> have arisen

<sup>1</sup> *Simmons v. Swift*, 5 B. & C. 857.

<sup>2</sup> *Scott v. Jester*, 13 Ark. 437.

<sup>3</sup> *Read v. Fairbanks*, 24 English L. & Eq. 220.

<sup>4</sup> *Atkinson v. Bell*, 8 B. & C. 277;

*Gregory v. Stryker*, 2 Den. (N. Y.) 628;

*Merrit v. Johnson*, 7 Johns. (N. Y.) 473.

<sup>5</sup> *Barker v. Roberts*, 8 Greenl. 101; *Rightmeyer v. Raymond*, 12 Wend. 51.

in which property in a raw state was delivered by one person to another, upon an agreement that it should be wrought upon and improved by the labor and skill of the bailee, and, when thus improved in value, should be divided in certain proportions between the respective parties; in which cases it has been held that the original owner retained his exclusive title to the property until the contract had been completely executed, and this, notwithstanding the labor to be performed by the bailee might be equal or even greater in value than that of the property when received by him. Thus,<sup>1</sup> where logs were delivered at a saw-mill under a contract with the miller that he should saw them into boards, and each party should have one half, it was decided to be a bailment, and not a sale of the logs, and that the bailor retained his general property until the contract was fully executed.<sup>2</sup>

§ 488. *Continued.* — It has been considered, as showing the intention of the parties, and where a chattel is made under a special contract, and given portions of the price are to be paid according to the progress of the work, that the payments of these instalments appropriate specifically to the employer the very chattel so in progress of construction, and vest in him a property therein, — in other words, it is a purchase of the specific articles of which the chattel is made, — and as between him and the builder he is entitled to insist upon the completion of that very article. And for any instalment remaining unpaid there would be a lien in favor of the builder as long as he remained in possession.<sup>3</sup> So, under a contract to build three light-vessels for the United States, and to deliver them completed within a fixed time, and to be governed during the progress of the building of them by the directions of an agent of the United States, and to perform the work to his satisfaction, for a price to be paid after their completion, with a provision that the United States may at any time declare the contract null, no title to the vessels passed to the United States until their completion and delivery.<sup>4</sup> But where a party contracted with a ship-builder to build him a ship for a certain sum, to be paid by instalments as

<sup>1</sup> *Pierce v. Schenck*, 3 Hill (N. Y.), 28.

<sup>2</sup> *Gregory v. Stryker*, 2 Den. (N. Y.) 628.

<sup>3</sup> *Woods v. Russell*, 5 B. & Ald. 942; *Goode v. Langley*, 7 B. & C. 26; *Walker v. Clyde*, 10 C. B. N. s. 381; *McElderry v. Flannagan*, 1 Harris & Gill (Md.), 308; *Hewlet v. Flint*, 7 Cal. 264. *Vide*, for

discussion of principles of *Wood v. Russell*, *Clarke v. Spence*, 4 Ad. & E. 448.

<sup>4</sup> *Briggs v. A Light-Boat*, 7 Allen, (Mass.), 287. When the government becomes the purchaser of property, it takes the title subject to the same rules as regulate the transfer of it to private persons; and if it be subject to liens, it passes *cum onere*. *Ibid*.



the work proceeded, the work to be superintended by the agent of the employer; on the payment of the first instalment the property in the portion then finished became vested in the employer, subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price, and that each material subsequently added became, as it was added, the property of the employer, as the general owner.<sup>1</sup> Again, parties contracted with another to build them a ship, and made advances from time to time, and the builder, as a security for the advances, gave a bill of sale of the ship, that the builder thereby "did sell . . . to the employers a certain ship in progress of building, to have and to hold the ship . . . to them forever, when she should be completed;" the present property passed to the employers by the bill of sale, and the vesting of it was not postponed by the *habendum* to the time when the vessel should be completed.<sup>2</sup>

§ 489. **Protection of Lien.** — The lien will be protected, both at law and in equity, as against the owner and all claiming through him, unless the party entitled has by some act of his own waived his privilege.<sup>3</sup> Thus, where one party is in possession of personal property on which he has a lien, and another party, with notice of that lien, acquires a subsequent one, the party having the prior possession has the better right until his lien is satisfied.<sup>4</sup> The property affected by it is not subject to seizure, even by a sheriff under an execution or attachment against the owner;<sup>5</sup> or, if sold thereby, the lien is not displaced.<sup>6</sup> When provided for by special contract of parties, it will be protected in equity upon chattels not in existence at the time of making the contract. Equity will attach and fasten the lien upon them the instant of their coming into existence, in such a manner as to exclude the ability of third persons to intercept and defeat the lien. Whatever doubts may have been entertained formerly, as to the possibility of subjecting to a charge properties not in existence at the time of declaring or contracting for the charge, there is now no uncertainty as to the doctrine that a lien may be created in advance of their existence, which will at once invest the properties upon their coming into existence, and will protect them against seizure or application to other purposes.

<sup>1</sup> Clarke v. Spence, 4 Ad. & E. 448.

<sup>2</sup> Read v. Fairbanks, 24 E. L. & Eq.

220.

<sup>3</sup> Patrick v. Montader, 13 Cal. 434.

<sup>4</sup> Orchard v. Cross, 12 Barb. (N. Y.)

294.

<sup>5</sup> Houlditch v. Desanges, 2 Stark. 299 ;  
Meeker v. Wilson, 1 Gall. 419.

<sup>6</sup> Hay v. Steamboat Winnebago, 10  
Wis. 428.

It may be that liens of the kind may not be such as courts of law will notice or enforce, and that the remedies of parties upholding or claiming the benefit of them can be had alone in courts of chancery.<sup>1</sup>

§ 490. **By Action and Damages.** — A right of lien in goods is so far a special property that it will support an action for the disturbance of the possession of the lien-holder against any one who converts them, although by authority of the general owner.<sup>2</sup> The remedy is by an action against the wrong-doer, either to recover possession by replevin or for a wrongful conversion<sup>3</sup> by trover.<sup>4</sup> A pawnee with a lien as against a stranger, who takes goods away, may recover their whole value in damages, though they were pledged to him for less, because he is answerable for the excess to the owner.<sup>5</sup> As against a party who has converted them by direction of the owner, the mechanic may recover the amount of his lien as damages. Otherwise, it seems, if the goods be of less value than the lien.<sup>6</sup> Whether a third party can avail himself of a lien in favor of a mechanic, in defence of an action of trover brought for the recovery of a chattel, there are authorities on both sides of the question.<sup>7</sup> It has been held that either the owner or mechanic may bring trespass or replevin against a third person.<sup>8</sup> This has also been denied, on the ground that the gist of trespass being an injury to the plaintiff's possession, while the property remains in the possession of a bailee, who is entitled to, and still maintains his lien thereon, the general owner cannot maintain trespass therefor.<sup>9</sup>

§ 491. **Comity, etc.** — The law of the place of domicile of the contracting party and the place where the contract is made determines if there be a lien arising out of the contract.<sup>10</sup> The just "comity," which is recognized in the law, requires that a contract should be expounded, and its obligations ascertained, according to the law of the country where it is made. But this

<sup>1</sup> McGraw v. Memphis & Ohio R. R., 5 Coldw. (Tenn.) 434; Pennock v. Coe, 23 How. (U. S.) 117; Robinson v. Mauldin, 11 Ala. N. s. 977; Seymour v. C. & N. R. R., 25 Barb. (N. Y.) 284.

<sup>2</sup> Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670.

<sup>3</sup> Wingard v. Banning, 39 Cal. 543; Tibbets v. Tibbets, 46 Me. 365; Meeker v. Wilson, 1 Gall. 419.

<sup>4</sup> Moore v. Hitchcock, 4 Wend. (N. Y.) 292.

<sup>5</sup> Harker v. Dement, 9 Gill (Md.), 8.

<sup>6</sup> Ingersoll v. Van Bokkelin, 7 Cow. 670.

<sup>7</sup> Bailey v. Adams, 14 Wend. (N. Y.) 201; 4 Wheat. 255; Bradley v. Spofford, 23 N. H. 444; 2 N. H. 319; 5 Tenn. 606; 7 East, 5; 9 Cow. 52; 6 Wend. 608; 4 Wend. 292; 1 Mason, 191.

<sup>8</sup> Neff v. Thompson, 8 Barb. (N. Y.) 213; 3 Hill (N. Y.), 491; Cro. Car. 271.

<sup>9</sup> Wilson v. Martin, 40 N. H. 88.

<sup>10</sup> Le Feuvre v. Sullivan, 10 Moore, P. C. 1. Wharton Conf. Laws, §§ 317, 318. The right of retention in Scotland is regulated by the *lex fori*. Robertson v. Bairs, 14 Shaw (2d Ser.), 1010.

principle does not extend to a recognition of a lien given by the foreign law, when it would operate prejudicially to the rights of others in the country where such lien is asserted. The liens given by the laws of one country upon movables have no superiority to liens subsequently acquired in another country to which those movables are carried.<sup>1</sup>

§ 492. **Enforcement of Liens.** — It has been held that courts of equity have jurisdiction to enforce liens on personal property,<sup>2</sup> on the ground that there is no adequate remedy at law.<sup>3</sup> In case of bill filed, all the owners and parties interested should be made parties.<sup>4</sup> The judgment is a confirmation of the lien,<sup>5</sup> and *in rem* against the property.<sup>6</sup>

<sup>1</sup> Donald v. Hewitt, 33 Ala. 534.

<sup>2</sup> Black v. Brennan, 5 Dana (Ky.), 310; Fox v. McGregor, 11 Barb. (N. Y.) 41.

<sup>3</sup> Trust v. Person, 3 Abb. Pr. (N. Y.) 84; 2 Kent Com. 642; 1 Strange, 556; 1 Holt N. P. 583. The jurisdiction of

chancery to enforce a sale seems to be denied in Thames Iron-work Co. v. Patent Derrick Co., 6 Jur. N. S. 1013.

<sup>4</sup> Case v. Wooley, 6 Dana (Ky.), 18.

<sup>5</sup> Annis v. Gilmore, 47 Me. 152.

<sup>6</sup> Thompson v. Gilmore, 50 Me. 428.

## CHAPTER XLVII.

## WHEN LIEN EXISTS.

§ 493. **Lien arises out of and is Security for Payment of Debt.** — The mechanics' lien on chattels, as on real estate, is simply a security for the payment of debt; without indebtedness to the mechanic there can be no lien. A release of the debt, without reservation, extinguishes the right of lien.<sup>1</sup> Statutes of limitations, being statutes of repose, suspend the remedy, but do not cancel the debt; and therefore, where the security for a debt is a lien on property, either personal or real, the lien is not impaired in consequence of the debt being barred by the statute of limitations.<sup>2</sup> If the debt was discharged, the lien would be gone, but the remedy alone is affected by their action.<sup>3</sup> The lien is commensurate only with the amount due.<sup>4</sup> A purchaser, either from the owner, or on execution against him, has accordingly been allowed to show the state of accounts between the former owner and the mechanic, and the lien of the latter confined to the amount due on the articles sold.<sup>5</sup> But a set-off cannot destroy a lien, unless it is so agreed between the parties; as in trover for certain iron-work, the defendant set up in defence a lien on the iron-work for work done to it at plaintiff's request. A claim of set-off to a larger amount on part of the plaintiff was held no answer to the lien, unless it had been agreed between the parties that the one should be deducted from the other.<sup>6</sup>

§ 494. **Necessity for Contract.** — The debt for which the lien is given must arise out of contract, express or implied. If one wrongfully and against the will of the owner add value to the property of the latter by his labor or expenditure;<sup>7</sup> or if a void contract be entered into for the performance of labor,<sup>8</sup> — in

<sup>1</sup> Pierce v. Sweet, 33 Penn. 151.

<sup>2</sup> Belknap v. Gleason, 11 Conn. 160 ; Higgins v. Scott, 2 B. & Ald. 413.

<sup>3</sup> Spears v. Hartly, 3 Esp. 81.

<sup>4</sup> Miller v. Atlee, 3 Wels. H. & G. 799.

<sup>5</sup> Moore v. Hitchcock, 4 Wend. 292.

<sup>6</sup> Pinnock v. Harrison, 3 M. & W. 532.

*Quære*, if mutual credits destroy a right of lien. Clarke v. Fell, 2 L. J. N. S. K. B. 81.

<sup>7</sup> Walther v. Wetmore, 1 E. D. Smith, 7.

<sup>8</sup> Ferguson v. Norman, 5 Bing. N. C. 76.

either case there will be no lien.<sup>1</sup> But a lien, it has been decided, may exist under an executed contract, although that contract were originally illegal. As where a claim arose on a transaction made on a Sunday, in the course of the ordinary calling of the bailee, and was illegal for that reason, under the statute of 29 Car. II. c. 7, a special property passed by the delivery of the thing, and the lien was valid; the maxim, *in pari delicto potior est conditio possidentis*, being applicable.<sup>2</sup>

§ 495. **Contract by Estoppel.**<sup>3</sup>—The doctrine of estoppel *in pais* is also applicable to the lien of mechanics on personal property. Parties will not be permitted to deny the legal effect of their acts when they will operate as a fraud upon others. Accordingly a binding agreement, arising out of a proposal to render service, may be constituted between parties, although the one does not specifically consent to the terms proposed by the other, provided the former leads the latter to receive the assistance required, on the fair presumption that it is rendered under the terms of his proposal.<sup>4</sup> The party furnishing the service must reasonably suppose he is doing the work for the owner, and the owner be aware of this fact; otherwise, the lien will not arise. As where a person contracted to finish a machine, and employed a mechanic, without the knowledge of the owner, to perform the work, disclosing to him the contract with the owner, it was held that such mechanic did not acquire a lien in his own right for his labor upon the machine as against the owner, although the owner knew he was performing the work, while it was in progress, as the work was done on the mechanic's credit.<sup>5</sup> The lien may also be lost by estoppel where its assertion would operate as a fraud on innocent parties.<sup>6</sup> A party who asserts to the world that he has been paid cannot claim a lien on the property for payment of his debt, as against those who have acted on the representation.<sup>7</sup> Or if a person having a lien conceal his interest, and thereby enable the owner to obtain an advance upon it, he will be postponed to the second encumbrancer.<sup>8</sup>

§ 496. **Privity of Contract necessary.**—In general, privity of contract is necessary between the owner and mechanic. Laborers hired by a contractor, in the absence of express statute, have no

<sup>1</sup> Sawyer v. Langford, 2 C. & K. 697.

<sup>2</sup> Scarfe v. Morgan, 4 M. & W. 232.

<sup>3</sup> [Approved in West v. Klotz, 37 Ohio St. 420, 429.]

<sup>4</sup> The Graces, 8 Jur. 501.

<sup>5</sup> Hollingsworth v. Dow, 19 Pick. 121. (Mass. 228.)

<sup>6</sup> Howard v. Tucker, 1 B. & Ad. 712.

<sup>7</sup> Pooley v. Budd, 7 E. L. & Eq. 229;

Woodley v. Coventry, 32 L. J. Ex. 185, pt. 1.

<sup>8</sup> Chapman v. Hamilton, 19 Ala. N. S.

lien as against the owner.<sup>1</sup> Journeymen have no other security for their wages than their employer's personal responsibility on the contract for hiring.<sup>2</sup> Thus, under a law that all mechanics of every sort, for work done and materials furnished in manufacturing personal property, shall have a special lien on the same, which must be asserted by the retention of the property and not otherwise, the lien does not attach in favor of a workman who is hired by another to do the work. In such case the possession and the lien is in the master or contractor.<sup>3</sup> So sub-contractors and servants of the person entitled to the lien acquire no interest in the property by reason of the rights or interest of their employers.<sup>4</sup> To be entitled, they must be bailees under the contract for work.<sup>5</sup> The Civil Code of Louisiana, giving a privilege on movables to a workman or laborer for the price of his labor on the movable he has repaired or made, if the thing continue in his possession, applies only to him who has contracted to do the work, and not to journeymen and other mechanics whom he has employed to work under him.<sup>6</sup> So under a statute where "any person who labors at cutting, hauling, or drawing wood, barks, logs, or lumber, shall have a lien thereon for his personal services, such lien is limited to the party alone who contracts with the owner of the property upon which the labor of the contractor and all his sub-contractors or servants is expended."<sup>7</sup> But under an almost identical statute, it was held, in another State, that a lien was created in favor of the latter. As where it was enacted that "any person who shall labor at cutting or driving logs, etc., shall have a lien on all logs, etc., he may aid in cutting or driving, for the amount stipulated to be paid for his personal services, and actually due," — laborers hired by a contractor have a lien on them as against the owner. It is, however, confined to such logs as they were employed to drive, and does not extend to those belonging to others. Such owner, if compelled to pay, may deduct the amount from what is due the contractor.<sup>8</sup> In California also a laborer has a lien under the "Loggers law."<sup>9</sup> But if it be further provided that "any person whose logs in the stream are so intermixed with those of another that they cannot be conveniently separated for the purpose of being floated down, may

<sup>1</sup> *Doe v. Monson*, 33 Me. 430; *Hoyt v. Story*, 3 Barb. (N. Y.) 262. <sup>392</sup>; *Lewis v. Patterson*, 20 La. An. 294.

<sup>2</sup> *McIntyre v. Carver*, 2 Watts & S. 392.

<sup>3</sup> *Quillian v. Central Railroad*, 52 Ga. 374.

<sup>4</sup> *Jacobs v. Knapp*, 50 N. H. 71.

<sup>5</sup> *McIntyre v. Carver*, 2 Watts & S.

<sup>6</sup> *Landry v. Blanchard*, 16 La. An. 173.

<sup>7</sup> *Jacobs v. Knapp*, 50 N. H. 71.

<sup>8</sup> *Doe v. Monson*, 33 Me. 430.

<sup>9</sup> *Wilson v. Barnard*, 67 Cal. 423. See further on the log question, § 515.]

drive them all, and recover from such other owner a reasonable compensation for driving of his part," any owner who is compelled by such intermixture to drive the logs of other persons as well as his own, is bound, in selecting the time for driving, and in all other particulars in which the rights of such others are involved, to exercise good faith, sound discretion, and prudent management. After having thus proceeded, there arises to him a claim to recover of the others a reasonable compensation; and it is no defence to such claim that they had formed the purpose and made ample provision to drive their own logs.<sup>1</sup> If a legislature should undertake to extend this lien to sub-contractors and others in whose favor no lien existed at the time of making the contract, and as to whom no privity of contract existed with the owner, its action would be unconstitutional.<sup>2</sup>

§ 497. **Lien only created by Owner or Agent.** — As the lien is a proprietary interest for the security of debt arising by implication of law out of the performance of contract, it can in general be created only by the owner, or by some person by him authorized.<sup>3</sup> This power to contract on the part of an agent may, as in other cases of agency, be shown by either express authority or by implication. Previous dealing for the principal by the agent, or what fairly falls within the scope of his duty, will be sufficient. Thus a tailor, who makes the livery of a master out of cloth delivered to him by a servant, has a lien for the value of his work.<sup>4</sup> There is no implied authority in one co-tenant to create a lien on their joint chattel. As where two persons built a ship together, to be owned by them in certain proportions, and one advanced more than his proportion of the expenses, he had no lien on the ship for the balance due to him.<sup>5</sup> So, as to third parties, if no authority exists to engage the performance of the work, there is no lien. Accordingly, where a servant took his master's chaise, which had been broken by his negligence, to a coach-maker to be repaired, without his master's knowledge, the coach-maker had no right to detain the chaise against the master for the repairs.<sup>6</sup> Exceptions to this general rule exist in those cases where there is some legal obligation resting on the party to receive possession and be at trouble in regard to the goods of another. Thus innkeepers, being compelled to receive guests and their horses may claim a lien on the

<sup>1</sup> Foster v. Cushing, 35 Me. 60.

<sup>2</sup> Jacobs v. Knapp, 50 N. H. 71.

<sup>3</sup> Hollingsworth v. Dow, 19 Pick. 46.  
(Mass.) 228; Turner v. Deane, 3 Wels.  
H. & G. 886.

<sup>4</sup> Johnson v. Hill, 3 Stark. 172.

<sup>5</sup> Merrill v. Bartlett, 6 Pick. (Mass.)

<sup>6</sup> Hiscox v. Greenwood, 4 Esp. 174.

latter for their keep against the rightful owner, although wrongfully seized under color of legal proceedings, unless they knew the guest was a wrong-doer.<sup>1</sup> So carriers, who are bound to receive all goods offered for transportation, are not compelled to inquire into the title of the party who delivers them, but may assert their lien for the carriage against the real owner, although they were stolen by the person on whose account they were carried.<sup>2</sup> Where, however, an artisan has a lien for his general balance, and the owner of goods entrusts them with another for manufacture, and the latter delivers them to the artisan, this lien extends to all the goods to be wrought upon, though they do not belong to the person who brought them in, provided the artisan was ignorant that they belonged to another.<sup>3</sup> If he know who the true owner is, the lien will not attach. Thus, where a grazier employed a salesman to sell cattle, who employed a book-keeper, whose duty it was to receive the purchase-money and to keep an account of the cattle sold, distinguishing what each beast sold for, and to whom it belonged, the book-keeper could not retain the money for the grazier's cattle from him on the ground of a balance due from the salesman.<sup>4</sup> A mechanic making needed repairs on a locomotive or other chattel has a lien that is superior to that of a previously existing mortgage. If chattels liable to need repairs are left by the mortgagee in possession of the mortgagor for a long time, the latter has implied authority to have the repairing attended to, and create a lien.<sup>5</sup>

§ 498. **Performance of Contract.**—The lien being in the nature of an implied contract that the party who has performed the labor may hold the goods until he receives the pay for doing what he had undertaken to perform about them, at the request of the owner, it follows, if he has not fully performed what he undertook, such a contract cannot fairly be inferred. To allow him to hold the goods might in effect, in many cases, deprive the owner of the right to have the damages for the non-performance of the contract deducted. He might be compelled to pay the amount demanded in order to gain possession of his goods.<sup>6</sup> So it has been held that where a person contracted to cut down the timber of another, and deliver the same by a certain time at a certain place, for a certain price to be then paid, and was to

<sup>1</sup> *Johnson v. Hill*, 3 Stark. 172.

<sup>2</sup> *Yorke v. Grenaugh*, 2 Ld. Raym. 867.

<sup>3</sup> *Weldon v. Gould*, 3 Esp. 268.

<sup>4</sup> *Good v. Jones*, Peake Cas. 235.

<sup>5</sup> [*Watts v. Sweeney*, 127 Ind. 117, 123.]

<sup>6</sup> *Hodgdon v. Waldron*, 9 N. H. 66.



have a lien upon the wood for the stipulated payments, and he failed to deliver by the time specified, he lost his right of lien, where he had been paid for all the work actually done, to hold possession of what he had cut in expectation of the future fulfilment of his contract, as he had himself violated it.<sup>1</sup> The necessity for entire performance of contract has been pushed to the extent that a lien does not exist for the contract price when only a part of the work has been done, and that though the owner prevents the contract from being consummated.<sup>2</sup> This decision would seem to conflict with the following, that where a contract is entered into, by which a party agrees to manufacture boards for another, and to transport them to market at a stipulated price, and provision is made by the contract, giving the manufacturer a lien upon the boards which shall be delivered by him after the delivery of a specified quantity; if the whole quantity of boards made be not sufficient to enable the manufacturer to deliver the specified quantity and satisfy his lien, and such inability is caused by the omission of the other party to supply him with a sufficient number of saw-logs out of which to manufacture boards, the common-law lien attaches to the last quantity manufactured, notwithstanding the special agreement.<sup>3</sup>

§ 499. **When Contract is inconsistent with Lien.** — The right of lien being founded on an implied contract, where it appears that the parties have contracted for a particular time of payment, or for a mode inconsistent with the contract which the law would otherwise imply, no lien exists.<sup>4</sup> As where the agreement looks to the personal credit of the debtor or another for satisfaction of his demand.<sup>5</sup> So, if a party receive a particular security.<sup>6</sup> Inasmuch as possession is essential to the continuance of the lien, if the agreement fix the time of payment to a day subsequent to that on which, by its terms, goods are to be delivered, there is no lien, although in case of insolvency of the employer the mechanic might stop them *in transitu*.<sup>7</sup> A lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed.<sup>8</sup>

<sup>1</sup> Hilger v. Edwards, 6 Nev. 84.

<sup>2</sup> Lilley v. Barnsley, 1 C. & K. 344.

<sup>3</sup> Mount v. Williams, 11 Wend. 77.

<sup>4</sup> Dunbar v. Pettee, 1 Daly (N. Y.), 112; Randell v. Brown, 2 How. (U. S.) 406.

<sup>5</sup> Bailey v. Adams, 14 Wend. (N. Y.) 201.

<sup>6</sup> Davis v. Bowsher, 5 D. & E. 488.

<sup>7</sup> Fieldings v. Mills, 2 Bosw. (N. Y.)

489; Tamvaco v. Simpson, 19 C. B. N. S. 453; Curtis v. Jones, 1 How. (N. Y. Ct. of App.) 149.

<sup>8</sup> Raitt v. Mitchell, 4 Camp. 146; Peroux v. Howard, 7 Pet. (U. S.) 324; Stevens v. Faucet, 24 Ill. 483; Woolen Man. v. Huntley, 8 N. H. 441; Stickney v. Allen, 10 Gray (Mass.), 352; Dunham v. Pettee, 1 Daly (N. Y.), 112.

But it has been said that the law, in holding that a party who has thus given credit for goods waives his lien, does so on the implied condition that the receiver of them will keep his credit good. If, therefore, before payment and after sale, a vendee becomes bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them, his lien is restored, and he may hold the goods as security for the price.<sup>1</sup> A contract for payment in advance is no waiver.<sup>2</sup> But a deposit of goods for a particular purpose inconsistent with the notion of a lien, as to hold them or the proceeds for the owner or a third person, does operate as such waiver.<sup>3</sup> So an express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of the lien to any greater extent; as a stipulation that the property shall remain liable for a first payment and separate securities shall be taken for the residue.<sup>4</sup> Again, where parties undertake to regulate by agreement the extent of lien, the contract will not be held to include a debt incurred for additional work outside of its terms, when it is not alleged that such additional work was done on the faith of the lien, or that there was an agreement between the parties that the lien should be enlarged to include the price of such work.<sup>5</sup> A right of lien which would otherwise attach may be waived by custom or course of dealing.<sup>6</sup> As keeping a chattel for another, and turning its keep into the current of general deal, and putting it in with and upon the same footing as other matters of charge having no relation to the chattel upon which the party was receiving pay by current credits to the owner, or charges by him, is altogether inconsistent with the idea of an implied lien to secure the charges for the keep.<sup>7</sup>

§ 500. **For what and to whom Lien is given.** — The labor, services, and expenditures which entitle to the lien are such as any person may perform, the natural result of which is to increase the value of the article. It applies equally to the original manufacture, addition, or repair of personal chattels, and covers the full value of the work done and materials expended, though they may exceed in value the original article.<sup>8</sup> It is not confined to any particular class of manufacturers, artisans, or mechanics, or those who follow exclusively any special

<sup>1</sup> Arnold *v.* Delano, 4 Cush. (Mass.) 33.

<sup>2</sup> Ruggles *v.* Walker, 34 Vt. 470.

<sup>3</sup> Randall *v.* Brown, 2 How. (U. S.) 406.

<sup>4</sup> Brown *v.* Gilman, 4 Wheat. (U. S.) 255

<sup>5</sup> Donald *v.* Hewitt, 33 Ala. 534.

<sup>6</sup> Raitt *v.* Mitchell, 4 Camp. 146.

<sup>7</sup> Wills *v.* Barrister, 36 Vt. 220.

<sup>8</sup> Gregory *v.* Stryker, 2 Den. (N. Y.) 631.

calling or trade, but extends to every bailee for hire, and known in the civil law as *locatio operis faciendi*.<sup>1</sup> Thus, coach-makers have a specific lien upon carriages sent to them for repair.<sup>2</sup> So, iron-workers,<sup>3</sup> dyers,<sup>4</sup> calico-printers,<sup>5</sup> bleachers, drapers,<sup>6</sup> fullers,<sup>7</sup> tailors,<sup>8</sup> brickmakers,<sup>9</sup> millers,<sup>10</sup> manufacturers of starch or other articles,<sup>11</sup> printers,<sup>12</sup> engravers,<sup>13</sup> publishers,<sup>14</sup> shipwrights,<sup>15</sup> farriers,<sup>16</sup> trainers,<sup>17</sup> veterinary surgeons,<sup>18</sup> and accountants.<sup>19</sup> If the bailee do not work upon the thing, or perform such labor as by his services and expenditures additional value is added, it has been held there is no lien, as a certificated conveyancer;<sup>20</sup> so an agistor of cows has been decided to have no lien;<sup>21</sup> so a livery-stable keeper,<sup>22</sup> unless by special agreement with the owner.<sup>23</sup> Another, and probably a better reason, has been assigned for a denial of the lien to these latter; namely, that the very nature of the bailment in case of livery-stable keepers and agistment of milch cows does not contemplate a continuing possession on the part of the person rendering the service, — that standing at livery implies the right of the owner to take possession and use the animal at pleasure.<sup>24</sup> The common-law lien for work done on personal property does not extend to the poles and wires of a telegraph system, because they are real estate, on which there can be no lien at common law.<sup>25</sup>

§ 501. **Incidental Labor.** — Labor and expenditures proper or necessary for the performance of the contract, though incidental,

<sup>1</sup> *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Nevan v. Roup*, Clarke, 207; *Townsend v. Newell*, 14 Pick. (Mass.) 332; *McIntyre v. Carver*, 2 Watts & S. 392; *Gregory v. Stryker*, 2 Den. (N. Y.) 628; *Chappell v. Cady*, 10 Wis. 111.

<sup>2</sup> *Houlditch v. Milne*, 3 Esp. 86; *Houlditch v. Desanges*, 2 Stark. 299.

<sup>3</sup> *Pinnock v. Harrison*, 3 M. & W. 532.

<sup>4</sup> *Green v. Farmer*, 4 Burr. 2214; *Bennett v. Johnson*, 2 Chitty, 455.

<sup>5</sup> *Weldon v. Gould*, 3 Esp. 268.

<sup>6</sup> *Ex parte Andrews*, Cooke, 460.

<sup>7</sup> *Rose v. Hart*, 8 Taunt. 499.

<sup>8</sup> *Cowper v. Andrews*, Hob. 42; *Hussey v. Christie*, 9 East. 433.

<sup>9</sup> *Moore v. Hitchcock*, 4 Wend. 292.

<sup>10</sup> *Chase v. Westmore*, 5 Maule & S. 180; *Ex parte Ockenden*, 1 Atk. 235.

<sup>11</sup> *Ruggles v. Walker*, 34 Vt. 470.

<sup>12</sup> *Blake v. Nicholson*, 3 Maule & S. 167.

<sup>13</sup> *Marks v. Lahee*, 3 Bing. N. C. 408.

<sup>14</sup> *Brook v. Wentworth*, 3 Anstr. 881.

<sup>15</sup> *Franklin v. Hosier*, 4 B. & Ald. 341.

<sup>16</sup> *Bac. Abr. Trover* (E.), 694; *Muspratt v. Gregory*, 1 M. & W. 641.

<sup>17</sup> *Scarfe v. Morgan*, 4 M. & W. 283.

<sup>18</sup> *Lord v. Jones*, 24 Me. 439.

<sup>19</sup> *Bruce v. Irvine*, 13 Shaw Cas. 437.

<sup>20</sup> *Steadman v. Hockley*, 15 L. J. Ex. 819.

<sup>21</sup> *Chapman v. Allen*, Cro. Car. 271; *Jackson v. Cummins*, 5 M. & W. 342; *Stone v. Lingwood*, 1 Stark. 651.

<sup>22</sup> *Wallace v. Woodgate*, Ry. & Moody, 193; *Judson v. Etheridge*, 1 Cr. & M. 743; *Orchard v. Rackstraw*, 9 M. G. & S. 698; *Dixon v. Dalby*, 1 Up. Can. 79.

<sup>23</sup> *Donatty v. Crowther*, 11 Moody, 479; *Saint v. Smith*, 1 Coldw. (Tenn.) 51.

<sup>24</sup> *Judson v. Etheridge*, 1 Cr. & M. 743; *Orchard v. Rackstraw*, 19 L. J. C. P. 303; *Sanderson v. Bell*, 2 Cr. & M. 304; *Fox v. McGregor*, 11 Barb. (N. Y.) 41; *Wills v. Barrister*, 36 Vt. 220.

<sup>25</sup> [*Vane v. Newcombe*, 132 U. S. R. 220.]

will be protected by the lien. Thus, warehousemen have a lien not only for storage, but necessary expenses for hauling the goods to the warehouse.<sup>1</sup> A factor has a lien not only for his commissions for selling the goods, but also for holding, storing, and insuring them.<sup>2</sup> So if an individual, at the request of the owner of goods, agree to convey them for him for a certain price, and to obtain possession from an express company, has to pay a bill for their former carriage, he has a lien for the amount paid the company for express charges, as he took the place of the express company in respect to their lien.<sup>3</sup> But a dyer has no lien on goods delivered to him in the course of trade but for the price of dyeing.<sup>4</sup>

§ 502. — **Extent of Lien.** The right of lien is confined to the chattel operated upon, and does not extend to articles of the owner with which he may have wrought. For example, a printer into whose hands stereotype plates are put for the purpose of printing from has no right of lien or retention over them for his account for printing from them the work of which they are the plates.<sup>5</sup> The whole theory of a lien for labor and materials rests upon the basis that such labor and materials have entered into and contributed to the production or equipment of the thing upon which the lien is impressed, and the party having it in his possession has a right to retain the thing itself, whatever it may be, until the services in relation thereto shall have been paid by the general owner.<sup>6</sup> Accordingly, where it is enacted that "any ship-carpenter, etc., or other person who shall perform labor or furnish materials for or on account of any vessel building or standing on the stocks, etc., shall have a lien for his wages or materials," the moulds for a vessel or the model of a ship cannot be regarded as a part of the materials with which it is constructed. They are used in its building as patterns in a foundry, or the last for a shoe. They may be indispensable for the construction of a vessel, as are the tools of the carpenter or joiner, or the ground upon which the keel is laid and the ship finished, but they do not enter into its structure. The materials of which the moulds are made do not belong to the vessel, nor does the title to them pass to its purchaser. They may be used again, if another vessel of the same tonnage and form is to be built; or they may be modified for

<sup>1</sup> *Burr v. Daugherty*, 21 Ark. 559.

<sup>5</sup> *Brown v. Sommerville*, 6 Shaw Cas.

<sup>2</sup> *Sheldon v. Raveret*, 49 Barb. (N. Y.) (2d ser.) 1267.

203.

<sup>3</sup> *Coller v. Shepard*, 19 Barb. (N. Y.) 305.

<sup>6</sup> *Phillips v. Wright*, 5 Sandf. (N. Y.)

<sup>4</sup> *Green v. Farmer*, 1 W. Bl. 651.

342.

another of different size, and are, therefore, not subject to the lien.<sup>1</sup>

§ 503. **No Liens for Expenditures in taking Care of Chattel.** — An artificer who, in the exercise of his right of lien, detains, for the price of his work, a chattel upon which he has expended his labor and materials, has no claim, in the absence of any special usage of trade, against the owner of the chattel for warehousing or taking care of it while so detained. Such a claim has no foundation *ex contractu* or *ex delicto*. The owner of a chattel can hardly be supposed to have promised to pay for the keeping of it, while against his will he is deprived of the use of it; and there seems no consideration for such a promise. The chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained. It would be attaching another right; namely, that if the bailor fail to pay, the article shall be kept at his expense. It may, however, be acquired by express agreement or usage of trade. Where such a charge is made, and paid under protest, money had and received lies.<sup>2</sup> So a person has no right to keep the property of another, and charge for the standing of it, unless there was a previous bargain between him and the owner or his authorized agent.<sup>3</sup>

<sup>1</sup> Ames v. Dyer, 41 Me. 397.

<sup>2</sup> British Empire Ship Co. v. Somes, 5 Jur. N. s. Ex. Ch. 675; 1 Ell. Bl. & Ell. 353; affirmed in Exchequer Chamber, Id.

367, and in House of Lords, 8 H. L. Cas. 338.

<sup>3</sup> Buxton v. Baughan, 6 C. & P. 674.

## CHAPTER XLVIII.

## WAIVER OF LIEN.

§ 504. **General Principles.** — As the right of the lienor is a mere privilege to hold possession of a chattel, the property of which is in the general owner, any act inconsistent with this possession on his part, or title in the owner, is deemed a waiver of the lien.<sup>1</sup> Thus a voluntary surrender of possession of the thing to the owner, or delivery to a third party, or any other act inconsistent with his own possession, operates as an abandonment. Accordingly, where a party having a lien on goods caused them to be taken in execution at his own suit, he thereby destroyed his right of lien, though the goods had never been removed from his premises; for possession must have been virtually vested in the sheriff in order to enable him to sell them.<sup>2</sup> So if goods in the possession of a party having a lien on them are attached at the suit of such party, he waives his lien thereby.<sup>3</sup> Again, where a party has possession of goods on which he has advanced money, and is ordered to sell them and apply the proceeds in a way inconsistent with his right of lien, to which he assents, he cannot, after the sale, claim his lien; he will be held to have waived it.<sup>4</sup> A consent, however, to hold property for another, but subject to a party's own lien, is not a waiver.<sup>5</sup> A misuse of the property by sale or pledge of the article;<sup>6</sup> or attempting to sell it, and sending it to a market for that purpose;<sup>7</sup> or wrongfully detaining goods or refusing to comply with the lawful demands of the owner;<sup>8</sup> or any conversion thereof to his own use which militates against the right of property in the owner, as drawing out a quantity of wine from a cask and filling

<sup>1</sup> *Gurr v. Cuthbert*, 12 L. J. Ex. 309; *Bean v. Bolton*, 3 Phila. 87.

<sup>2</sup> *Jacobs v. Latour*, 2 M. & P. 201; s. c. 5 Bing. 130.

<sup>3</sup> *Legg v. Willard*, 17 Pick. (Mass.) 140.

<sup>4</sup> *Harrison v. Scott*, 10 Jur. 443.

<sup>5</sup> *Wilson v. Martin*, 40 N. H. 88. So a lien of a bailee for work on a chattel is lost by buying such chattel of the general

owner in payment of such work and other claims. *Mexal v. Dearborn*, 12 Gray (Mass.), 336.

<sup>6</sup> *Scott v. Newington*, 1 M. & Rob. 252; *Jones v. Cliffe*, 1 Cr. & M. 540; *Gallaher v. Cohen*, 1 Browne (Penn.), 43.

<sup>7</sup> *Vincent v. Conklin*, 1 E. D. Smith, 203.

<sup>8</sup> *Walker v. Wetmore*, Id. 7.

it up with water, — will operate as a waiver.<sup>1</sup> Consequently an unqualified refusal to surrender upon a demand duly made is evidence of a conversion, because it involves a denial of any title whatever in the person who makes the demand.<sup>2</sup> So where a lien upon goods exists, and the party, when demand of the goods is made, asserts his right to hold as purchaser, and not on account of the lien, he cannot in an action brought against him protect himself under the lien.<sup>3</sup> If, however, the contract between the parties authorize the possession of the lienor under circumstances otherwise inconsistent with the lien, there will be no waiver in maintaining the rights thus secured by the agreement.<sup>4</sup> But the conduct of the lien-holder must be covered by the terms of the stipulation. As where a party has a number of articles in his possession, with a lien and power of sale to pay expenses, he has no right to sell more than enough to pay what is owing. The sale of the balance is a conversion.<sup>5</sup> Any person who by labor and skill imparts additional value to personal property, acquires a common-law lien thereon, which is not lost by taking the promissory note of the debtor, payable to their order, provided possession of the property be retained, and before demand therefor the debtor becomes insolvent and the note is in consequence dishonored. Nor does the negotiation of the note divest the lien if the lien-holder is obliged to provide for its payment.<sup>6</sup>

§ 505. **Question of Intention — Effect of Waiver.** — Waiver of lien is always a question of intention. There must be a knowledge of the circumstances, and some act done, with the intention to waive the right, by the party thereto entitled.<sup>7</sup> It is a question of fact, to be gathered from the evidence and nature of the transaction.<sup>8</sup> As in the establishment of a lien the burden of proof is on the party claiming it,<sup>9</sup> so when either admitted or once shown to exist, it will rest upon the party denying it to show satisfactorily that the party entitled does not rely upon it as a means of enforcing reimbursement for his labor.<sup>10</sup> A lien cannot be waived and resumed at pleasure.<sup>11</sup> When once volun-

<sup>1</sup> *Johnson v. Johnson, Rowe*, 437; *Whitlock v. Heard*, 13 Ala. N. S. 776.

<sup>2</sup> *Hanna v. Phelps*, 7 Ind. 21; *Picquet v. M'Kay*, 2 Blackf. 465.

<sup>3</sup> *Saltus v. Everett*, 20 Wend. (N. Y.) 267; *Mexal v. Dearborn*, 12 Gray (Mass.), 336.

<sup>4</sup> *Bradeen v. Brooks*, 22 Me. 463.

<sup>5</sup> *Whitlock v. Heard*, 13 Ala. N. S. 776.

<sup>6</sup> [*Myers v. Uptegrove et al.*, ante, 3 How. Pr. N. S. 316.]

<sup>7</sup> *Steamboat Robert Morris v. Williamson*, 6 Ala. N. S. 50.

<sup>8</sup> *Griggsby v. Hair*, 25 Ala. N. S. 327.

<sup>9</sup> *Wills v. Barrister*, 36 Vt. 220.

<sup>10</sup> *Hague v. Sheriff of Lewis Co.*, 1 Wash. T. 195.

<sup>11</sup> *Picquet v. M'Kay*, 2 Blackf. 465.

tarily waived, it is gone,<sup>1</sup> and is the same as if it had never existed.<sup>2</sup> It will not revive on a party recovering his possession,<sup>3</sup> unless the chattel had been stolen or taken away by a trespasser or by fraud; in which case the lien in reality never ceased to exist.<sup>4</sup> The surrender of a lien constitutes a valuable consideration to support an independent contract or promise to pay a debt.<sup>5</sup> Thus if a tradesman, having goods in his possession, upon which he has a lien, parts with these goods on the promise of a third person to pay the demand, such promise is not within the Statute of Frauds.<sup>6</sup> So if a mechanic, working for a contractor, is restrained from filing his claim for lien, by a promise of the owner to pay him, by which his lien against the property was lost, the owner is liable on such promise, though not in writing.<sup>7</sup>

§ 506. **Loss of Lien by Surrender of Possession.** — The general rules of the common law respecting the waiver of lien by parting with possession are now well settled.<sup>8</sup> A claimant, by parting with his dominion over the property so as to put it out of his power to surrender it on demand to the general owner on payment or tender of the price of manufacturing or repairing it, loses all right of lien therein.<sup>9</sup> Accordingly, if one have a lien on chattels for labor performed thereon, and deliver them up to the owner or his agent,<sup>10</sup> without insisting on holding them as security, the lien is dissolved.<sup>11</sup> Or if the owner of a sawmill, who has a lien upon lumber sawed by him, voluntarily permit the owner to remove it from his possession, it is gone, and the owner of the lumber may sustain trespass for a subsequent taking of the property by a stranger.<sup>12</sup> So a party who contracted to build a steamboat and deliver it at a certain day has no lien after having parted with the property unconditionally.<sup>13</sup> The lien of an artisan upon an article manufactured by him is also lost by a voluntary abandonment of the possession of the property.<sup>14</sup> Under the statute in regard to the liens of laborers and artisans, if the laborer has possession of the chattel on which he claims a lien, he can enforce it by a sale, but if he surren-

<sup>1</sup> Ireland v. Berryman, 3 Bush (Ky.), 356.

<sup>2</sup> Pharis v. Leachman, 20 Ala. N. S. 662.

<sup>3</sup> Sweet v. Pym, 1 East, 4.

<sup>4</sup> Wallace v. Woodgate, Ry. & M. 194.

<sup>5</sup> Walker v. Taylor, 6 C. & P. 752.

<sup>6</sup> Houlditch v. Milne, 3 Esp. 86.

<sup>7</sup> Andre v. Bodman, 13 Md. 255.

<sup>8</sup> Pinney v. Wells, 10 Conn. 104.

<sup>9</sup> Ruggles v. Walker, 34 Vt. 470; Smith v. Scott, 31 Wis. 420.

<sup>10</sup> Stickney v. Allen, 10 Gray (Mass.), 352.

<sup>11</sup> Brackett v. Hayden, 15 Me. 347.

<sup>12</sup> Bailey v. Quint, 22 Vt. 464.

<sup>13</sup> Walker v. Anshutz, 6 Watts & S. 519.

<sup>14</sup> King v. Indian Orchard C. C., 11 Cush. (Mass.) 231.



ders it, he loses his lien both at common law and under the statute. So where a wagon was repaired by a laborer, who surrendered it to the owner before payment was made, it was held, that the laborer had no lien upon the wagon, either at common law or under the statute, for his work done and material furnished in making the repairs.<sup>1</sup> A party who assumes possession of personal property in a representative capacity, which is inconsistent with his previous possession of the property under his individual lien thereon, is presumed to have waived his lien, and he cannot at the same time defend his possession both in his representative and in his individual capacity.<sup>2</sup> But leaving grain harvested and threshed, on the premises of the owner in charge of a third person, is not a waiver of the lien against an attaching creditor with knowledge of the claim of lien.<sup>3</sup> Possession of the chattel on which a lien is claimed for work done at common law, is absolutely necessary for the existence of the lien, and by the surrender of the possession, the lien is lost. . . . If the laborer has never had a chattel on which the lien is claimed, or in cases when he cannot get possession, as in cases of repairs to houses, he can enforce his lien in the manner provided by the statute.<sup>4</sup> The delivery or parting with possession sufficient to effect this loss of lien is such a delivery as would be sufficient under the Statute of Frauds to vest title; words alone, unaccompanied by acts, cannot make out a delivery.<sup>5</sup> But it may be lost by entering into an obligatory agreement, based on a legal consideration, to deliver it up, — possession in such case need not pass. A parol promise to pay the debt of another, and void by the Statute of Frauds, furnishes no sufficient consideration for such agreement.<sup>6</sup> To determine if a lien has been waived by a written instrument, it is necessary to examine the whole instrument, and to compare the parts invoked to defeat the lien with all the other parts.<sup>7</sup>

**§ 507. Delivery of Part does not waive Lien on Balance.** — Delivery of part of goods manufactured or repaired as one transaction does not impair the lien on the balance for the whole amount due.<sup>8</sup> Thus, a tailor employed to make a suit of clothes has a lien for the whole price upon any part of them.<sup>9</sup> So,

<sup>1</sup> [McDougall v. Crapon, 95 N. C. 292.]

<sup>2</sup> [Gardner v. Gillihan, 20 Or. 598.]

<sup>3</sup> [Hogue v. Sheriff of Lewis Co., 1 Wash. Tr. 172, 173.]

<sup>4</sup> [McDougall v. Crapon, 95 N. C. 292.]

<sup>5</sup> Gardet v. Belknap, 1 Cal. 399.

<sup>6</sup> Danforth v. Pratt, 42 Me. 50.

<sup>7</sup> Kimball v. Ship Anna, 2 Cliff. C. C. 4.

<sup>8</sup> Partridge v. Trustees of Dart. Col., 5 N. H. 286; [Myers v. Uptegrove, 3 How. Pr. N. s. 316.]

<sup>9</sup> Blake v. Nicholson, 3 Maule & S. 167.

although one who had cut and hauled to his mill a quantity of timber from the land of another to be sawed, delivered a part of it to the owner, his whole claim for cutting, hauling, and sawing is nevertheless a lien upon that part which remains in his possession.<sup>1</sup> A portion of boards were delivered without requiring payment for their sawing, and the mill-owners retained possession of the residue; they might enforce their lien for the whole work done against the portion left in their possession.<sup>2</sup> The same rule applies to other cases of lien. Delivery of part of goods mentioned in one bill of lading to the consignee does not defeat a lien on the remainder for the whole freight unpaid,<sup>3</sup> as a carrier may, if he see fit, deliver a part of a particular shipment, without impairing his right to hold the residue for the freight upon the whole consignment from which the part so delivered was taken.<sup>4</sup> But where a storekeeper made advances to the owner of a lot of grain deposited in the storehouse, and the owner sold the grain and granted an order of delivery to a purchaser, and the order was intimated to the storekeeper, and several parcels of the grain were subsequently delivered to the purchaser's order, but no transfer was made in the storekeeper's books to the name of the purchaser, nor the grain measured to him, the storekeeper was not entitled to withhold delivery of the remainder, on the ground of a lien for the advances to the original owner as against the *bona fide* purchaser.<sup>5</sup>

§ 508. **Surrender must be voluntary.** — For delivery to operate as a waiver of lien there must be a voluntary surrender of possession with intent, expressed or implied, to part with the lien. The mere manual delivery of an article by a mechanic does not, of itself, operate necessarily to discharge it.<sup>6</sup> Consent to change of possession may be given, and will be as effectual after as before a removal; and such consent may be inferred from the conduct of the party as well as by direct evidence. If possession is gained wrongfully or fraudulently, it gives no lien; so, if it be given for a special purpose, it cannot be applied to another. The same equity requires that if the possession be lost wrongfully or fraudulently, and be afterwards regained without fraud or wrong, the lien will be in force.<sup>7</sup> A delivery, also, procured by fraud does not occasion a forfeiture. It is in law

<sup>1</sup> Palmer v. Tucker, 45 Me. 316.

<sup>2</sup> McFarland v. Wheeler, 26 Wend. (N. Y.) 467; Ruggles v. Walker, 34 Vt. 470.

<sup>3</sup> Frothingham v. Jenkins, 1 Cal. 42.

<sup>4</sup> Sears v. Bags Linseed, 1 Cliff. C. C. 68.

<sup>5</sup> Laurie v. Black, 10 Shaw Cas. 1.

<sup>6</sup> One hundred and fifty-one Tons of Coal, 4 Blatchf. C. C. 368.

<sup>7</sup> Johnson v. The McDonough, Gilpin, 101.

no delivery. To establish otherwise would be at variance with every principle of reason and justice, and offer a premium to fraud.<sup>1</sup> Thus, where a party relinquishes a prior lien in consequence of a fraud upon him, he may annul the agreement for relinquishment, and retake the article under his prior lien.<sup>2</sup> So if delivery of goods to a purchaser be made in reliance on a contemporaneous payment, which turns out not to have been actually made, the intention to waive the lien will be negatived, and possession may be taken, as if no delivery had occurred.<sup>3</sup> Delivery of goods by a mechanic and payment by the owner are concurrent acts, and neither party is bound to perform his part of the contract, unless the other is ready to perform the correlative act;<sup>4</sup> and if a man purchase goods at a shop for cash, and they are handed to him, or put by the shopkeeper into his wagon, and he then refuse to pay for them, they may be retaken;<sup>5</sup> or if the owner falsely and fraudulently promise to pay when the goods are received, the lien continues, and the manufacturer may bring replevin.<sup>6</sup> The surrender must be voluntary. If goods are taken out of the hands of a party who has a lien, *in invitum*, or by operation of law, his lien is still preserved.<sup>7</sup> Although personal property cannot, without the consent of a person holding a lien thereon, be removed from his possession upon a levy under execution against the owner, yet it may be sold on execution subject to the lien, and it seems the lienholder may be required to permit its exposure for sale in that manner. So, if the lien-holder voluntarily surrenders the property to the officer charged with the execution against the owner, the officer may remove and sell the same, and the lien will not be defeated when it is returned to the lien-holder.<sup>8</sup>

§ 509. **Claim of Lien on Demand of Chattel.** — When possession is demanded by the owner or other person lawfully entitled, the party claiming the possession of the chattel should state his claim of lien, its nature and amount.<sup>9</sup> In England the rule seems to be, that a person having a lien upon goods does not waive it by the mere fact of his omitting to state that he claims them in that right when they are demanded. But if a different ground of retention than that of the lien, and inconsistent there-

<sup>1</sup> Walcott v. Keith, 22 N. H. 196.

<sup>2</sup> Lynch v. Tibbits, 24 Barb. (N. Y.)

51.

<sup>3</sup> Carson v. Shantz, 3 Phila. 47.

<sup>4</sup> Frothingham v. Jenkins, 1 Cal. 42.

<sup>5</sup> Lane v. Old Colony R. R. Co., 14

Gray (Mass.), 148; One hundred and fifty-one Tons of Coal, 4 Blatchf. C. C. 368.

<sup>6</sup> Bigelow v. Heaton, 4 Den. 496.

<sup>7</sup> Wilson v. Kymer, 1 Maule & S. 157.

<sup>8</sup> Glassner v. Wheaton, 2 E. D. Smith,

352.

<sup>9</sup> Heine v. Anderson, 2 Duer (N. Y.),

318.

with, be assumed, the lien ceases to exist.<sup>1</sup> Thus, where a person who had a lien on an article purchased it from the bailor after his bankruptcy, and, when the article was demanded of him by the assignees, refused to give it up, saying, "I may as well give up every transaction of my life," this was held not to amount to a waiver of his lien, and that the lien was not merged in the purchase.<sup>2</sup> In this country, some courts have held to the like effect that a lien is not waived by the mere omission to place the refusal to deliver on demand, on the specific ground of lien;<sup>3</sup> others, that a party cannot insist that his lien has not been discharged, unless he made claim of the lien when the demand was made.<sup>4</sup> An American court, on a review of all the English and American cases, states the general rule to be that a party having the possession of goods, with a specific lien thereon for work done upon them, should, when they are demanded and refused to be delivered, inform the owner of his claim of lien, and if at the time of trial a different ground is set up for their retention from what was relied upon on the original refusal to deliver, it will operate as a waiver of the lien, and the right of the party to detain them, on the trial. If, however, the party has a lien on the goods for a particular charge, as for work performed upon them, and also a general balance of account for other demands against the owner, for which he has no lien, he will not be held to have waived his lien for the former amount, on the trial, if at the time of the demand and his refusal to deliver them, he especially mentioned or referred to the particular charge for which the lien existed, as a ground on which he claimed the right to detain them; although he may at the same time have insisted on detaining them for other claims for which he had no lien, or until the payment of the whole balance of his general account against the owner. But in such a case, by claiming to detain the goods for the general balance, without mentioning, or specially referring to the particular charge for which the lien attached, he will be held to have waived his lien for the latter sum, and the owner may thereupon recover possession in replevin, without paying or tendering the amount. It is not necessary, however, in such case, to name and specify the amount of such particular demand; but there should be some special mention or suggestion made of it at the time of the demand and

<sup>1</sup> *Hanna v. Phelps*, 7 Ind. 21.

<sup>3</sup> *Everett v. Coffin*, 6 Wend. 603.

<sup>2</sup> *White v. Gainer*, 3 Bing. 23; s.c. 1 C.

& P. 324; *Jones v. Cliff*, 5 C. & P. 560; <sup>4</sup> *Spence v. McMillan*, 10 Ala. N. S.

*Owen v. Knight*, 4 Bing. N. C. 54; *Mexal* 183.

*v. Dearborn*, 12 Gray (Mass.), 336.

*Dows v. Morewood*, 10 Barb. (N. Y.)

refusal, to apprise the owner of the existence of such lien and demand, and to make it appear that the party claimed to detain the goods upon a ground on which he had a legal right to detain them at the time.<sup>1</sup> The lien would, of course, be waived if the bailee stated, with knowledge, that he had no charge against the goods.<sup>2</sup>

§ 510. **Claim of a Right independent of Lien.** — It is clearly settled law that a party who, when goods are demanded of him, rests his detention upon other grounds, making no mention of his lien, will be considered as thereby waiving his right thereto.<sup>3</sup> Claiming to be paid a sum of money which has no relation to the lien,<sup>4</sup> as a demand for rent of premises where chattels were stored, will operate as a waiver.<sup>5</sup> But the claim of a general lien will not always be considered as a waiver of the right to detain under a particular lien; because, it is said, a party who claims a lien in respect of two sums is not supposed to have waived it in respect of one of them. The more natural conclusion is that he intended to insist on both. It is the duty of the bailor to tender either one sum or the other. If he do, it may cause the bailee to reflect whether he has a right to detain for any other claim.<sup>6</sup> So, where there was a claim of lien in respect of repairs done to a carriage, some of which had been ordered and some not, a claim for both was no waiver of the real claim, inasmuch as the latter was relied on.<sup>7</sup>

§ 511. **Tender.** — Upon tender of the amount for which the lien is security, the lien is discharged,<sup>8</sup> and it is the duty of the bailee to surrender the chattel to the owner.<sup>9</sup> The further retention of the property then becomes a fraudulent possession.<sup>10</sup> If the bailee refuse, the owner may maintain trover against him for the property, and is entitled to damages for the full value of the property, without any abatement for the amount of lien. The creditor must resort to his action to recover his money.<sup>11</sup> When the lien terminates or is divested, all connection between the property and the debt is at an end, and the one cannot be pleaded or given in evidence in an action brought for the recovery

<sup>1</sup> *Thatcher v. Harlan*, 2 *Houst. (Del.)* 178.

<sup>2</sup> *Blackman v. Pierce*, 23 *Cal.* 508.

<sup>3</sup> *Gillespie v. Goddard*, 1 *Pitts. (Penn.)* 306; *Weeks v. Goode*, 6 *C. B. N. s.* 367; *West v. Tupper*, 1 *Bailey*, 193; *Boardman v. Sill*, 1 *Camp.* 410, *n.*; *Dirks v. Richards*, 4 *M. & G.* 574.

<sup>4</sup> *Scott v. Jester*, 13 *Ark.* 437.

<sup>5</sup> *Weeks v. Goode*, 6 *C. B. N. s.* 367.

<sup>6</sup> *Scarfe v. Morgan*, 4 *M. & W.* 273.

But see *Sanderson v. Bell*, 2 *Cr. & M.* 304.

<sup>7</sup> *Green v. Shewell*, cited in 4 *M. & W.* 277.

<sup>8</sup> *Ball v. Stanley*, 5 *Yerg.* 199.

<sup>9</sup> *La Motte v. Archer*, 4 *E. D. Smith*, 46; *Brenan v. Currant*, *Sayer*, 224; *Picquet v. M'Kay*, 2 *Blackf.* 465.

<sup>10</sup> *Randell v. Brown*, 2 *How. (U. S.)* 406.

<sup>11</sup> *Ball v. Stanley*, 5 *Yerg.* 199.

of the other. The necessity for this restriction will be apparent, since it would be futile to prohibit the conversion of property covered by a lien, and yet limit the liability for a violation of the rule to the difference between the value of the property and the amount of the debt, thus enabling the creditor to pay himself by his own wrong, and coupling a disregard of the law with an advantage denied to its observance.<sup>1</sup> Where a mechanics' lien has once been destroyed by a good tender, it is unnecessary that the debtor should afterwards have in court the amount due, in case of suit brought against him by the claimant. If the tender be refused, the true objection thereto should be stated, as the one made at the time of the tender by the claimant precludes him from afterwards availing himself of any other objection, however valid; if the objection made be not well founded, the tender will be held good. A tender of the amount due, on condition that the property be delivered, is not conditional, but a valid tender.<sup>2</sup> A lien upon chattels gives the right of possession, and such right of possession is not destroyed by a tender of the amount of the lien after suit is brought and costs accrued, without a tender also of such costs.<sup>3</sup>

§ 512. **Tender when unnecessary.**—The necessity for a tender will be dispensed with when the bailee assumes a position relative to the property inconsistent with the title of the owner, who in such case has a right to infer that a tender would be unavailing.<sup>4</sup> In trover by the owner of goods against a bailee who detained them under a claim of lien, it was held not necessary to entitle the plaintiff to recover, that he should prove an actual tender of the amount, if it appear he was ready to pay it, and the defendant refused to deliver the goods except on payment of an alleged old balance for which no lien existed.<sup>5</sup> In a later case, the claim of a larger amount than was due was decided not to exonerate the owner from making a tender; if the defendant had been shown the lesser amount, he might have been willing to accept it.<sup>6</sup>

<sup>1</sup> *Bean v. Bolton*, 3 Phila. 87.

<sup>2</sup> *Moynahan v. Moore*, 9 Mich. 9.

<sup>3</sup> *Lauer v. Livings*, 24 Kan. 273.

<sup>4</sup> *Hanna v. Phelps*, 7 Ind. 21; *Scott v. Jester*, 13 Ark. 437; *West v. Tupper*, 1 Bailey, 193.

<sup>5</sup> *Jones v. Tarleton*, 9 M. & W. 675. Compare *Scarf v. Halifax*, 7 M. & W., and 2 Q. B. 387.

<sup>6</sup> *Allen v. Smith*, 12 C. B. N. S. 645.

## CHAPTER XLIX.

## SOME SPECIAL LIENS.

§ 513. **Care and feeding of Horses, Cattle, etc.** — Under chapter 498, New York Laws of 1872, as amended by chapter 145, Laws of 1880, a livery-stable keeper has the right to detain horses until all charges for their board and keep are paid, provided he serves a notice, in writing, containing the amount of the charges and of his intention to detain the animals therefor. The livery-stable keeper has a reasonable time after the board becomes due in which to prepare his bill of charges and serve the notice of lien, and the right to such lien is not cut off by a sale of the animals by the owner before the statutory notice is given. The possession of the animals by the stable keeper is constructive notice to a purchaser of the right to the lien.<sup>1</sup> An inchoate lien attaches when the horses are placed in the stable. It is waived if the statutory notice be not given. It becomes effective and complete when such notice is given, relating back and embracing all the charges due.<sup>2</sup> A stable keeper must serve notice on the owner of the horse in order to assert his statute lien.<sup>3</sup> The statutory lien of a stable keeper is, like a common-law lien, lost by voluntary parting with possession to the owner.<sup>4</sup> One who keeps and trains another horse at the owner's request has a statutory lien for the keep, and a common-law lien for the training.<sup>5</sup> If a person puts his horse in the hands of a trainer to be trained at a stipulated sum, the trainer has a lien upon the horse for his services and expenses, and an offer to sell the horse to pay such expenses will not be treated as a conversion, it appearing that the act of offering to sell was not in defiance of the owner's title, but only an irregular mode of attempting to enforce a lien.<sup>6</sup> Persons employed to drive cattle are not herders

<sup>1</sup> [Lessells v. Farnsworth, *ante.*, 3 How. Pr. N. s. 364.]

<sup>2</sup> [Lessells v. Farnsworth, *ante.*, 3 How. Pr. N. s. 73.]

<sup>3</sup> [Armitage v. Mace, 48 N. Y. Super. Ct. 107.]

<sup>4</sup> [Seebaum v. Handy, 46 Ohio St. 560.]

<sup>5</sup> [Towle v. Raymond, 58 N. H. 64.]

<sup>6</sup> [Shields v. Dodge, 14 Lea, 356.]

within the meaning of section 848 of the Revised Statutes, "that any ranchman, farmer, agister, or herder of cattle, . . . to whom any horses, mules, asses, cattle, or sheep shall be intrusted, and a contract for their keeping be entered into between the parties, for the purpose of feeding, pasturing, herding, or ranching, shall have a lien upon said horses and cattles . . . for the amount that may be due for such feeding and herding, . . . and shall be authorized to retain possession of such horses and cattle . . . until said amount is paid." Under such statute, before a lien is created there must be a delivery of possession, and a contract for the keeping of the cattle, for the purpose of feeding, herding, ranching, or pasturing.<sup>1</sup> A person pasturing another's milch cow for the season in the usual manner under an agreement with the owner, is so far intrusted with the animal as to have a statutory lien upon it for the charge of pasturing, as against the owner and third persons having no title or right of possession.<sup>2</sup> In Maine, also, there is a lien for feeding and sheltering animals.<sup>3</sup> But such a lien is not maintainable against funds resulting from the sale of the animals on another petition by the same or a different claimant.<sup>4</sup> There is in New York a lien for the services of a licensed stallion on the mare served.<sup>5</sup>

§ 514. **Cropper's Liens.** — One who harvests and threshes grain is, under section 10, Laws of Washington, 1859-1860, page 287, entitled to a lien thereon, unless there be something in the nature of his contract showing he did not look to such property for security of his claim. The statute provides that "any person who shall bestow labor on any article of personal property, at the request of the owner thereof, shall have a lien on such property for his just and reasonable charges for the labor he has performed, and such person may hold and retain possession of the same until such just and reasonable charges are paid."<sup>6</sup> Every agreement between the owner of lands with a cropper for their cultivation, is a special and entire contract. If the cropper abandons it before completion he cannot recover for a partial performance, and his interest becomes vested in the landlord, divested of any lien which may have attached to it, for agricultural advances, while it was the property of the cropper. Every person who makes advancements of agricultural supplies to a

<sup>1</sup> [Underwood v. Birdsell, 6 Mont. 142, 145.]

<sup>2</sup> [Smith v. Marden, 60 N. H. 509.]

<sup>3</sup> [Collins v. Blake, 79 Me. 218; Lord v. Collins, 79 Me. 227.]

<sup>4</sup> [Lord v. Collins, 76 Me. 443, 445; 79 Me. 227, 230.]

<sup>5</sup> [Tuttle v. Dennis, 58 Hun, 35, 36.]

<sup>6</sup> [Hogue v. Sheriff of Lewis Co., 1 Wash. Tr. 172, 174.]



tenant or cropper, does so with notice of the rights of the landlord, and the risks of the tenant or cropper abandoning or otherwise violating his contract.<sup>1</sup> Where the agreement to advance agricultural supplies is confined to a single transaction, and to the delivery of articles or money to be used in making the crop, it is immaterial which act is done first, — the delivery of the supplies or the reduction of the agreement to writing, — if both acts are done at the same time and in execution of the contract. As it has been held that the registration of the agreement is not essential to the validity of the lien, as between the parties thereto, it is doubtful whether a compliance with the other requirements contained in the statute is necessary, as between the parties.<sup>2</sup> Where the landlord furnished land, stock, etc., and the cropper the labor for producing the crop, which was to be controlled by the landlord until the rent and advances were paid, and the remainder to be equally divided between them, the cropper is entitled to a lien on the crop after the rent and advances are paid.<sup>3</sup> One employed to cut and stack wheat acquires no lien under the Oregon statute. Possession of the crop or a specified agreement for lien is necessary in such a case.<sup>4</sup>

§ 515. **Log-Liens.** — The Michigan law says, “any person who performs labor” on logs shall have a lien, and under the rule *facit per alium facit per se* the contractor has a lien. But the act of Minnesota, declares, “This act is intended only for the protection of laborers for hire, and shall not enure to the benefit of any person interested in contracting, cutting, hauling, banking, or driving logs by the thousand.”<sup>5</sup> How it would be with contractors by the hundred is not stated, — a surprisingly miserable way of wording a law, this specimen is. One claiming a log-lien under the Michigan Act 229 of 1887 must have done *some* personal labor under the contract.<sup>6</sup> “Chopping” is included in the statute word “cutting,” “loading” is included in “hauling,” and “swamping” in “skidding.”<sup>7</sup> The word “supplies” in sec. 17, ch. 413, Wisconsin Laws of 1889 (provided that no lien upon logs for supplies shall be had, except in certain counties), includes board furnished to men employed in getting out

1 [Thigpen v. Leigh, 93 N. C. 47.]

2 [Reese v. Cole, 93 N. C. 87.]

3 [McElmurray v. Turner, 86 Ga. 215.]

4 [McDermid v. Foster, 14 Or. 417,

422-425.]

5 [King v. Kelly, 25 Minn. 522.]

6 [Kieldsen v. Wilson, 77 Mich. 45;

overruled in Phillips v. Freyer, 80 Mich. 254; sustaining Shaw v. Bradley, 59 Mich. 199, that the contractor need not render personal service.]

7 [Chair Co. v. Runnels, 77 Mich. 106.]

or running the logs. Sec. 14, ch. 413, Laws of 1889 (giving a lien upon logs for services in cooking food for the men working upon the logs) does not give a lien for board furnished to such men, including the raw materials used in preparing the food; and one who has contracted to furnish such board at a stipulated price cannot have the contract apportioned so as to have a lien for his labor in cooking.<sup>1</sup> A boom company has a lien for driving the logs of individual owners who have allowed their logs to become intermingled with those of the company without fault of the latter, and the owner must pay the cost of separating the logs as well as a reasonable compensation for services in running them.<sup>2</sup> There is no lien for removing obstructions on a stream which requires the aid of artificial means in running the logs by means of dams, etc.<sup>3</sup> A provision that "any person who labors at cutting or drawing logs shall have a lien thereon" gives a lien to sub-contractors, — any one who actually cuts or hauls.<sup>4</sup> A law giving sub-contractors a lien for labor on logs against the owner is not unconstitutional. The law enters into the contract of the owner with the contractor, and so obviates the objection that there is no privity of contract between the owner and the laborer.<sup>5</sup> A laborer's log-lien under the Michigan law of 1887, does not depend on the state of the accounts between the owner and the contractor. This lien cannot go beyond the sum the owner agreed to pay for the work, but it extends up to this limit whether the price has been paid to the contractor or not.<sup>6</sup> If the T. company, having a contract to run logs for H., engages S. to do the actual work as the company's agent, the lien belongs to T.,<sup>7</sup> and the same is true where T. is an individual instead of a company, there being nothing in the contract with H. to show that T. is to do the work personally.<sup>8</sup> A scaler employed by the month by the vendor of logs, or by the vendee, or by both jointly, may be employed by the vendor to assist in loading the logs, and may have a lien for the latter service as well as for the scaling as against the vendee, provided the services rendered in loading did not interfere with his duties as scaler.<sup>9</sup> One who labors at hauling logs has a lien on them for

<sup>1</sup> [Bradford v. Underwood L. Co., 80 Wis. 50.]

<sup>2</sup> [Hall v. Tittabawassee Boom Co., 51 Mich. 377, 405.]

<sup>3</sup> [Kroll v. Nester, 52 Mich. 70; Shaw v. Bradley, 59 Mich. 200, 209.]

<sup>4</sup> [Quimby v. Hazen, 54 Vt. 132, 138, disagreeing with Jacobs v. Knapp, 50

N. H. 71, a case under an almost identical statute.]

<sup>5</sup> [Reilly v. Stephenson, 62 Mich. 509.]

<sup>6</sup> [Federspiel v. Johnstone, 87 Mich. 303, 307.]

<sup>7</sup> [Hall v. Tittabawassee Boom Co., 51 Mich. 377, 402.]

<sup>8</sup> [Shaw v. Bradley, 59 Mich. 199.]

<sup>9</sup> [Kline v. Comstock, 67 Wis. 473.]

his services and those of the team he uses, if he is in rightful possession of it and entitled to its earnings, though not the owner of it. But the service must be performed on the logs, not merely in filing saws, repairing sleds, keeping time, etc.<sup>1</sup> Where A. contracts to manufacture shingles for B., and semi-monthly statements are made and notes taken, but the shingles first manufactured are not kept separate, the contract will be regarded as a continuing one, and the lien for the last work done will attach to any and all the shingles.<sup>2</sup> Plaintiff contracted to raft and boom all the logs which a certain firm had in a certain stream. All the logs except four were delivered to the firm prior to July 11, and both parties treated the contract as fully performed; but in October following, the plaintiff in "clearing up" the stream found said four logs and delivered them. Held that such delivery did not keep alive plaintiff's rights to a lien on the logs previously delivered, no claim for a lien having been filed within thirty days after such previous delivery. The plaintiff's services could not be deemed continuous.<sup>3</sup> One who holds property under claim of lien is under no obligation to take it to a particular place at the owner's request, in order that he may replevy it.<sup>4</sup> One who seeks to break a lien on the ground that the demand is excessive should tender what he himself considers reasonable.<sup>5</sup> A common-law lien is waived by commencing proceedings to enforce a statutory lien for the same service.<sup>6</sup> The affidavit must state by whom the labor was performed.<sup>7</sup> The affidavit under the Michigan log-lien law need not show who was the owner of the logs.<sup>8</sup> Technical defects in the affidavit will not defeat the lien after judgment below.<sup>9</sup> An affidavit in attachment stating that "the plaintiff has filed a lien for the amount due him for labor" is a substantial compliance with the statute requiring the affidavit to state "that a statement of lien required by law was filed."<sup>10</sup> Where logs are in transit from A. to B., notice to B. as owner is sufficient, if A.'s rights are not in fact prejudiced by the omission of notice to him.<sup>11</sup> Under law authorizing persons

<sup>1</sup> [Kelley v. Kelley, 77 Me. 135, 137-138.]

<sup>2</sup> [Craddock v. Dwight, 85 Mich. 587.]

<sup>3</sup> [Fish Creek Band L. D. Co. v. First National Bank, 80 Wis. 630.]

<sup>4</sup> [Hall v. Tittabawassee Boom Co., 51 Mich. 377.]

<sup>6</sup> [Id.]

<sup>6</sup> [Phillips v. Freyer, 80 Mich. 254.]

<sup>7</sup> [Chair Co. v. Runnels, 77 Mich. 106.]

<sup>6</sup> [Wiggins v. Houghton, 89 Mich. 469,

476; Reilly v. Stephenson, 62 Id. 509, 515; Shaw v. Bradley, 59 Id. 199; Babcock v. Cook, 55 Id. 1, 7; Chair Co. v. Runnels, 77 Mich. 105.]

<sup>9</sup> [Babcock v. Cook, 55 Mich. 1; court equally divided.]

<sup>10</sup> [Pack v. Circuit Judge, 70 Mich. 135.]

<sup>11</sup> [Chair Co. v. Runnels, 77 Mich. 105, 110.]

having claims "in less sums than one hundred dollars each . . . to unite their claims either before or after filing statements of liens, and to designate one of their number as their agent for prosecuting such lien" it was held that the object of the law was to prevent multiplicity of suits, and although the agent was a person whose claim amounted to more than one hundred dollars, and therefore not strictly within the law, the suit was upheld.<sup>1</sup> If the declaration is against four hundred thousand feet of logs, and the sheriff seizes only one hundred thousand feet, a judgment of lien against the whole four hundred thousand feet is good if the rights of no other log-owner than the debtor intervene.<sup>2</sup> In an action to enforce a lien on logs it is not necessary to allege in the writ the ownership of the logs, or that the owner was unknown.<sup>3</sup> In a writ of attachment to secure a lumberman's lien upon logs, if the mandate to the officer contain a sufficient description of the logs and a direction to attach them as security for the plaintiff's lien for the labor thereon, it is not necessary that the declaration should allege that the plaintiff labored upon the logs, nor that it should contain any reference to his lien.<sup>4</sup> An attachment upon the logs of several owners will not be quashed on motion of one of them, because the affidavit shows that part of the labor claimed for was not lienable, or does not show what labor was performed on the logs, or said owner, or the last day of the labor for each owner. All such questions will be determined at the trial.<sup>5</sup> Where the owner of logs on which there is a lien indistinguishably mingles them with logs on which there is no lien, the officer should attach the entire lot.<sup>6</sup> Owners of logs legally attached, who, without giving bond, take them and saw them up, are liable in trespass on the case, or in trover for the value of the lien.<sup>7</sup> Failure of the justice to wait one hour after the return-hour for the log-owner's appearance, he having had sufficient notice, is at most only an irregularity that will not subject the judgment to attack in a collateral proceeding.<sup>8</sup> The jury must find that the sum due was for labor on the logs described in the declaration, or a judgment of lien will be reversed.<sup>9</sup> Correction by the court of a verdict in a log-lien

<sup>1</sup> [Wiggins v. Houghton, 89 Mich. 469, 475.]

<sup>2</sup> [Huntoon v. O'Brien, 79 Mich. 227, 231.]

<sup>3</sup> [Parker v. Williams, 77 Me. 418.]

<sup>4</sup> [Hill v. Callahan, 58 N. H. 497.]

<sup>5</sup> [Pack v. Circuit Judge, 70 Mich. 135; Wiggins v. Houghton, 89 Id. 468.]

<sup>6</sup> [Parker v. Williams, 77 Me. 418, 421.]

<sup>7</sup> [Goodrow v. Buckley, 70 Mich. 513.]

<sup>8</sup> [Chair Co. v. Runnels, 77 Mich. 105.]

<sup>9</sup> [Demars v. Conrad, 73 Mich. 151.]

suit, by cutting the judgment down to less than the sum found to be due at the trial, which was more than the plaintiff claimed, does not authorize the granting of a new trial.<sup>1</sup> In the absence of express agreement a logging contractor is not responsible to owners for costs of defending against an illegal claim of lien.<sup>2</sup>

<sup>1</sup> [Federspiel v. Johnstone, 87 Mich. 303.]

<sup>2</sup> [Meyer v. Montgomery, 87 Mich. 278.]



## APPENDIX.





# FORMS.<sup>1</sup>

---

*Claim of Lien by Sub-contractor, under Act of June 16, 1838.*

*State of Pennsylvania.*

IN THE DISTRICT COURT OF THE CITY OF PHILADELPHIA :

A. A.	}	<i>Claim of Lien.</i>
vs.		
B. B., Owner,		
and		
C. C., Contractor.		

This is to give notice that the said A. A. hereby files his claim or statement of his demand in the office of the Prothonotary of the District Court of the city of Philadelphia, State of Pennsylvania, to secure the payment of the debt hereinafter mentioned, contracted for work done (or materials furnished, as the case may be) for and about the erection and construction of the building hereinafter described, which said debt is claimed to be a lien against the said building and the ground covered by the same, and against so much other ground immediately adjacent thereto, and belonging to the said B. B., owner of said building, as may be necessary for the ordinary and useful purposes of the same ; and sets forth :—

1. That A. A. is the name of the party claimant, and that B. B. is the name of the owner or reputed owner of the building, and that C. C. is the name of the contractor of the said building with whom the said A. A. contracted to perform the hereinafter-mentioned work.

2. The amount claimed to be due is            dollars ; the nature of the work done was laying of bricks for and about the erection and construction of said building within six months past, the particular items, amounts, and time when said work was done being set forth in a bill of particulars hereto annexed as a part of this claim.

3. The said building is known as No.        on        Street ; is located on that lot of ground (describing it), situate in the said city of Philadelphia ; its

<sup>1</sup> These forms are designed rather as suggestions than as guides to be followed literally. It is recommended to the young practitioner in the preparation of the necessary notices and pleadings to enforce the lien, that he in all cases should first carefully read the entire lien law in force in the State where the property is located, and then, with the statute-book open before him, make *seriatim* every averment made necessary, and as far as possible adopting the language employed in the statute.

size is about twenty-five feet front, with a depth of sixty feet ; has three stories and basement; and is constructed of bricks, being designed for dwelling purposes.

Witness my hand, this first day of January, 1874.

A. A.

L. L., *Attorney for Claimant.*

(Here must follow bill of particulars, as described above.)

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*Designation by Owner of Boundaries of Land to be subject to Lien, under Act of June 16, 1836.*

B. B., being the owner of that lot or piece of ground (here describe it) situate in the city of Philadelphia, and being desirous of contracting with C. C. for the erection of a dwelling-house thereon, does hereby define the boundaries of the lot appurtenant to such building, previously to the commencement thereof, to be as follows : (here set out the boundaries) that the same may be entered in the Mechanics' Lien Docket, and that the said designation of boundaries so made and entered upon record may be obligatory upon all persons concerned.

Witness my hand, this first day of January, 1874.

B. B.

*Petition by Contractor to designate Boundaries under Preceding Act.*

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE CITY OF PHILADELPHIA : —

The petition of C. C. respectfully shows : —

That B. B., of the city of Philadelphia, being the owner of a certain lot of ground (here describe it), situate in said city, commenced the erection of a brick dwelling-house thereon, without previously to the commencement of the same defining in writing the boundaries of the lot appurtenant to said building ; that your petitioner is entitled to a lien thereon, by virtue of the provisions of the Act of June 16, 1836, for work done for and about the erection and construction of said building, for the sum of        dollars.

Wherefore your petitioner prays the court to appoint competent and skilful persons as commissioners to designate the boundaries aforesaid, in conformity to the said Act.

Witness my hand, this first day of January, 1874.

C. C.

L. L., *Attorney for Claimant.*

(Affidavit verifying petition to be annexed.)

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*Return of Sheriff to Scire Facias under Preceding Act.*

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE CITY OF PHILADELPHIA : —

I, R. R., sheriff of the city of Philadelphia, do hereby certify in return to the within writ, that I served the same on the said B. B., within the city

aforesaid, on the fifth day of December, 1873, by reading it in his hearing, and by giving him a true and attested copy thereof, and that I left a copy thereof on the same day with J. J., residing in the building mentioned in said writ, which was occupied as a place of residence.

R. R., *Sheriff*.

*Notice of Lien by Contractor, under Chapter 500, Law of 1863.*

*State of New York.*

TO G. G., ESQ., CLERK OF THE CITY AND COUNTY OF NEW YORK:—

SIR,— This is to give notice that I, C. C., residing at No.        on Street, in the city of New York, do claim a lien upon that building and appurtenances situate on        Street in said city, and known as No.        on said street, and upon the lot on which the said building and appurtenances stand, which said lot and premises are situated on said        Street, and are known and described on the maps open to the public as (here describe lot), for the sum of        dollars, now due, for two hundred square yards of plastering performed towards the erection (or in altering, improving, or repairing, as the case may be) of the building aforesaid, in pursuance of the terms of a contract made between me, the said C. C., and one B. B., who is the owner of said building and appurtenances, and the lot on which the same stand; the said sum being due from the said B. B., as owner aforesaid, to me, the said C. C., as contractor; that three months have not yet elapsed since the said work was done.

Witness my hand, this first day of January, 1874.

C. C., *Claimant*.

L. L., *Attorney for Claimant*.

(Affidavit verifying claim to be annexed.)

*Notice of Contractor to enforce or foreclose the Lien, under Preceding Statute.*

C. C., Contractor,	}	<i>Notice of Contractor to foreclose Mechanics' Lien.</i>
vs.		
B. B., Owner,		
and		
D. D., Lien Claimant.		

Notice of the above-named C. C., contractor to B. B., owner of the herein-after-described building and appurtenances, and lot on which the same stand; and to D. D., who has filed a lien thereon.

This is to give notice that I, C. C., residing at No.        on Street, in the city of New York, within three months after the hereinafter-described work was done,— to wit, on the first day of January, 1874,— filed with the clerk of the city and county of New York the notice required by the sixth section of the act of the legislature of the State of New York, to secure the payment of mechanics, &c., passed May 5, 1863, claiming a lien upon that building and appurtenances situate on        Street, and known as No.        of said street, and upon the lot on which the said building and appurtenances stand, which said lot and premises are situated on said        Street, and are known and

described on the maps open to the public as (here describe lot), for the sum of \_\_\_\_\_ dollars, for labor performed towards the erection of the building aforesaid, in pursuance of the terms of the contract made between me, the said C. C., and yourself, the said B. B.; and which said lien is hereby claimed as aforesaid.

You, and each of you, will therefore take notice that you are required to appear and join in the said proceedings before this court, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 187\_\_\_\_, at the hour of \_\_\_\_\_ A. M.; and, in default thereof, the said C. C. will move the court to enter judgment against you, the said B. B., for the said sum of \_\_\_\_\_ dollars and interest thereon, from the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, with costs on account of the claim aforesaid, and that said judgment may be enforced by an execution on the said building and appurtenances, and the lot on which they stand.

Witness my hand, this \_\_\_\_\_ day of January, 1874.

C. C., Claimant.

L. L., Attorney for Claimant.

*Statement of Claim of Contractor against Owner, to be filed within Ten Days after Service of Foregoing Notice.*

IN THE COURT OF THE CITY AND COUNTY OF NEW YORK.

C. C., Contractor,

vs.

B. B., Owner,

and

D. D., Lien Claimant.

} *Statement of Claim of Contractor against Owner.*

The complaint of C. C., plaintiff, respectfully shows to the court: that the said C. C., in pursuance of the terms of a contract with the said B. B., did perform the labor of plastering two hundred square yards towards the erection of (or in altering, improving, or repairing, as the case may be) that building (here describe building and lot on which it stands, as in preceding notice); that the said work was finished on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_; that by the terms of the said contract the sum of \_\_\_\_\_ dollars became due to the plaintiff for the labor aforesaid, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, but the said B. B. has not paid the same, or any part thereof.

That at the time of making said contract, and until the filing of the herein-after-mentioned notice of lien, the said B. B. was the owner of the said building and appurtenances, and the said lot on which the same stand.

The plaintiff also shows: that on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, he filed with the clerk of the city and county of New York a notice duly verified claiming a lien on said building, appurtenances, and lot, to secure the payment of said indebtedness.

The plaintiff also shows: that on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, he caused a notice, a copy of which is hereto annexed, stating the said lien and time of filing the same, to be served upon the said B. B., as owner aforesaid, and D. D., who had filed a notice of mechanics' lien against said B. B., as owner of said building and premises, and requiring them and each of them to appear in this court on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at the hour of \_\_\_\_\_ A. M. Wherefore the plaintiff prays judgment against the said B. B. for the sum of \_\_\_\_\_ dollars aforesaid, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, besides costs.

And further, the plaintiff prays the said claim may be adjudged a lien on the said building and appurtenances, and the lot on which the same stand, and that the same may be sold to the extent of the right, title, and interest of the said B. B., existing at the time the said notice of lien was filed, and the proceeds applied to the payment of the plaintiff's claim as aforesaid, and costs of suit.

L. L., Attorney for Plaintiff.

*Claim of Lien under Statutes of New Jersey.*

(Nixon's Digest.)

STATE OF NEW JERSEY, }  
COUNTY OF . } to wit.

A. A., Contractor, }  
vs. } *Claim of Lien.*  
B. B., Owner. }

This is to give notice that A. A. hereby files this his claim of lien in the office of the clerk of \_\_\_\_\_ County, in said State, against that building and on the land whereon it stands, including the lot or curtilage whereon the same is erected, and which are more fully described hereinafter, to secure the payment of \_\_\_\_\_ dollars; a debt contracted and owing to the said A. A. by the said B. B., owner of the same, for materials furnished in the erection and construction of said building (and which are more fully set out in the bill of particulars hereinafter set out), within one year from the date of filing of this claim.

1. The said building is a three-story brick dwelling-house, twenty-five feet wide by a depth of sixty feet, known as No. \_\_\_\_\_ on the west wide of \_\_\_\_\_ Street, situate in the city of \_\_\_\_\_, in said county, and erected on that lot known on the plats thereof as lot No. \_\_\_\_\_ in block No. \_\_\_\_\_, said lot being thirty feet wide, and extending back with that width to a depth of one hundred feet.

2. The name of the owner of the said land is the said B. B., who has an estate of fee-simple therein.

3. The name of the person who contracted the said debt, for whom and at whose request the said materials were furnished for which said lien is claimed, is the said B. B.

4. The following bill of particulars exhibits the amount and kind of materials furnished, and the prices at which and times when the same were furnished, giving credit for all payments made thereupon, and deductions that ought to be made therefrom, and exhibits the balance justly due to the said A. A.

*Bill of Particulars.*

B. B., owner.

Dr. to A. A.

1873.			
Dec. 1.	To 5,000 press brick, @ \$25 per thousand	. . . . .	\$125.00
" 5.	" 10,000 red brick, @ \$12 per "	. . . . .	120.00
			\$245.00
			100.00
" 7.	By cash received	. . . . .	
	Balance justly due	. . . . .	\$145.00

All the above materials were furnished on and between Dec. 1, 1873, and Dec. 5, 1873, inclusive, payable on delivery.

Dated this first day of January, 1874.

A. A.

L. L., Attorney for Claimant.

*Affidavit.*

STATE OF NEW JERSEY, } to wit.  
COUNTY OF .

Personally appeared in the county aforesaid, before me, a justice of the peace in and for the county aforesaid, the said A. A., who makes oath, and says that he is the claimant in the foregoing claim of lien, and which is hereto annexed; that the above bill of particulars and statements are true; that the same is for materials furnished in the erection of the building in such claim described at the times therein specified, and that the amount as claimed therein is justly due to this affiant from the said B. B.

A. A.

Subscribed and sworn to this first day of January, 1874, before me, a justice of the peace for the county aforesaid.

J. J.

*Claim of Lien to be filed in Recorder's Office, under Section 1187 of Code of Civil Procedure of California.*

STATE OF CALIFORNIA, } to wit.  
COUNTY OF .  
A. A. Contractor, }  
vs. } Claim of Lien.  
B. B., Owner. }

This is to give notice that A. A., as contractor, hereby files this his claim of lien with the county recorder of \_\_\_\_\_ County, in said State, against all that two-story brick building known as No. \_\_\_\_\_ on \_\_\_\_\_ Street in the town of \_\_\_\_\_, in said \_\_\_\_\_ County, and against the land upon which the same is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, and which is known as lot No. \_\_\_\_\_, in square \_\_\_\_\_, in said city, fronting twenty feet on the west side of said \_\_\_\_\_ Street, and running back one hundred feet with that width, for the payment of the sum of \_\_\_\_\_ dollars, after having deducted all just credits and offsets, for laying ten thousand bricks, at \_\_\_\_\_ dollars per thousand, which was labor performed upon the construction (alteration or repairs, as the case may be) of the said building. That the name of the owner of the said building is B. B., and who, at the time the said work was commenced, was also the owner in fee-simple of the said land upon which the said building is constructed, together with a convenient space about the same. That the name of the person by whom the said A. A. was employed is the said B. B., and that it was verbally agreed by and between the said A. A. and B. B. that the said A. A. should perform the said labor of laying said ten thousand bricks at \_\_\_\_\_ dollars per thousand, to be paid for on the completion of the same; and that thereupon the said A. A. did commence the performance of said

work on said building on the first day of December, 1873, and did complete the same on the tenth day of December, 1873.

Witness my hand, this first day of January, 1874.

L. L., *Attorney for Claimant.*

A. A.

(This claim is to be verified by the oath of the claimant, or some other person.)

---

*Claim of Lien by Journeyman.*

(2 Wagner's Missouri Statutes, 1872, page 909.)

STATE OF MISSOURI, } to wit.  
COUNTY OF . }

A. A., Claimant }  
vs. } *Claim of Lien.*  
B. B., Owner. }

This is to give notice that A. A., as journeyman, hereby files this his claim of lien with the clerk of the Circuit Court of said County in said State, against that two-story frame building known as No. on Street, in the city of , in said county, and against the lot upon which the same is situated, and which is known as lot No. , in square , in said city, fronting on said Street fifteen feet, and running back with that width to the depth of one hundred feet, to the extent of all the right, title, and interest owned therein by B. B., the owner of said building, for whose immediate use and benefit the labor hereinafter mentioned was done.

The said claim of lien is made to secure the payment of the sum of dollars, for fifty days of labor at carpenter's work, at three dollars per day, making one hundred and fifty dollars, and which said labor was performed in the erection of said building under and by virtue of a contract with C. C., who was the contractor of the said B. B. for the erection of said building.

That the said sum of one hundred and fifty dollars for the labor aforesaid is a just and true account of the demand due him, the said A. A., after all just credits have been given. That the name of the owner of the said land and building is B. B., and the name of the said contractor of the said B. B. is C. C.

That the said labor was begun on the first day of November, 1873, and finished on the twentieth day of December, 1873, at which last-mentioned date the indebtedness aforesaid became due and owing.

Dated this first day of January, 1874.

A. A.

L. L., *Attorney for Claimant.*

(This claim must be verified by the oath of the claimant, or some credible person for him.)

---

*Notice of Sub-contractor to Owner of Claim of Lien, under Statutes of Wisconsin.*

(Taylor's Digest, 1871, chap. 153.)

To B. B., Owner : —

This is to give you notice that the undersigned A. A., residing at No. of Street, in the city of , has been employed by C. C., your contractor, to do the plumbing work for the erection of that three-story dwelling-

house known as No.            on            Street, in said city, situate on lot No.            in            , fronting twenty feet on said            Street, and running back with that width one hundred feet, of which you are the owner.

That in pursuance of said employment the undersigned has performed the plumbing work aforesaid, amounting to the sum of            dollars, now due and unpaid, the items of which are hereto annexed as a part of this notice, which said work was completed on the twenty-fourth day of December, 1873.

Therefore, that the undersigned hereby claims the benefit of a lien upon the said building and the said lot upon which the same stands as security for the payment of the said sum of            dollars due as aforesaid.

Dated this first day of January, 1874.

A. A.

(Bill of particulars to be annexed.)

*Bill or Petition to enforce Mechanics' Lien, under Revised Statutes of Illinois, 1868.*

STATE OF ILLINOIS,            }  
COUNTY OF            .            } to wit.

IN THE            COURT OF            COUNTY, TO THE TERM  
AT            , 18            .

TO THE HONORABLE JUDGES IN CHANCERY SITTING : —

Your petitioner, A. A., of the county and State aforesaid, respectfully represents : —

1. That on the first day of August, 1873, he entered into a contract with B. B., the owner of all that certain town-lot known as No.            in the city of            , in the county and State aforesaid, to furnish three hundred bundles of lathes, at fifty cents per bundle, for repairing that three-story frame building known as No.            of            Street, situated on said town-lot, which said lathes were to be furnished on or before the first day of September, 1873, and payment of the same to be made on the first day of October, 1873.

2. That in pursuance of the said contract your petitioner did furnish to the said B. B., owner as aforesaid, the said three hundred bundles of lathes, by delivering the same on the twenty-fifth day of August, 1873, to the said B. B., on the said premises, and which were subsequently used in the repair of said house by the said B. B., and by reason whereof there is due to your petitioner the sum of one hundred and fifty dollars.

3. That the time of payment for the same has passed, and the said B. B. has failed to pay any part of the said sum agreed therefor, although requested so to do, to the great damage of your petitioner. Your petitioner, therefore, prays your honors to grant him a mechanics' lien, as by the statute in such case is made and provided, and also that a writ of summons may issue out of and under the seal of this honorable court, directed to the sheriff of said county, therein commanding the said defendant to be and appear before this honorable court on a day therein to be stated, and to answer the premises, and to abide such order herein as to your honors may seem proper.

A. A.

L. L., *Solicitor for Petitioner.*



*Notice of Sub-contractor, Journeyman, or Laborer to Owner to retain Funds due Contractor, under Act of Congress, May 6, 1870.*

To B. B., Owner :—

SIR, — This is to give you notice that the undersigned, as sub-contractor, has been employed by C. C., your contractor, in the construction (or repair, as the case may be) of that three-story brick building known as No.                      on                      Street, in Washington City, D. C., situate on lot No.                      in square No.                      of the public plan of said city. That the amount due the undersigned by said C. C. is                      dollars, for laying three thousand bricks, at                      dollars per thousand, work done for and at the request of the said C. C. in the construction of the building aforesaid, of which you are owner.

And the undersigned holds you, as owner of said building, responsible for the same.

Yours respectfully,

A. A.



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[The chief heads in the Index are "Amendment," "Area," "Assignment," "Buildings," "Commencement," "Complaint," "Construction," "Contract," "Contractors," "Description," "Discharge," "Judgment," "Legislative Power," "Lessees," "Lien on Personal Property," "Loss," "Materials," "Material-men," "Nature of Lien," "Notice," "Owner," "Parties," "Performance," "Persons Entitled to Lien," "Persons Entitled to Subject Property to Lien," "Pleadings," "Possession," "Priorities," "Time, etc.," "Waiver," "Work, etc."]

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